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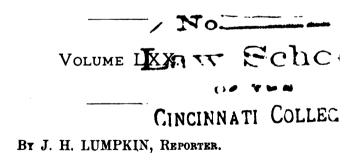
# OF CASES IN LAW AND EQUITY,

ARGUED AND DETERMINED IN THE

# SUPREME COURT OF GEORGIA,

AT ATLANTA.

Parts of February and September Terms, 1883.



ATLANTA, GEORGIA:

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## JUDGES AND OFFICERS

OF THE

# SUPREME COURT OF GEORGIA

#### DURING THE PERIOD OF THESE REPORTS.

Hon. JAMES JACKSON, Chief Justice	. Atlanta.
HON. MARTIN J. CRAWFORD, Associate Justice	. Columbus.
Hon. SAMUEL HALL, Associate Justice	. Macon.
Hon. M. H. BLANDFORD, Associate Justice*	
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## JUDGES OF THE SUPERIOR COURTS.

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ATLANTA	HON. W. R. HAMMOND	. Atlanta.
AUGUSTA	. Hon. H. C. Roney	. Thomson.
BLUE RIDGE	. Hon. James R. Brown	Canton.
BRUNSWICK	. Hon. Martin L. Mershon	. Brunswick
CHATTAHOOCHEE	. Hon. JAMES T. WILLIS	. Talbotton.
CHEROKEE	. Hon. Jorl C. Fain	. Calhoun.
COWETA	Hon. Sampson W. Harris	. Carrollton.
EASTERN	.Hon. A. P. Adams	. Savannah.
FLINT	. Hon. John D. Stewart	. Griffin.
MACON	. Hon. Thomas J. Simmons	Macon.
MIDDLE	. Hon. R. W. CARSWELL	. Louisville.
NORTHEASTERN	. Hon. John B. Estes	Gainesville,
NORTHERN	. Hon. Edward H. Pottle	. Warrenton.
OCMULGEE	. Hon. Thomas G. Lawson	Eatonton.
OCONEE	. Hon. A. C. Pate	Hawkinsville.
PATAULA	. Hon. John T. Clarks	. Cuthbert.
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RICHMOND COUNTYH	ON. WILLIAM F. EVE	Augusta.

<sup>\*</sup>Justice Crawford having died, Hon. M. H. Blandford was elected to fill his unexpired term. He qualified August 6, 1883.

#### NOTE.

By the Act of 1866 (section 4270 of the Code), the decisions of the Supreme Court are required to be announced by written synopses of the points decided. The decisions thus announced are published as the opinions of the Justices delivering them, the head-notes being made by the Reporter. Where head-notes are made by the Court, it is so stated.

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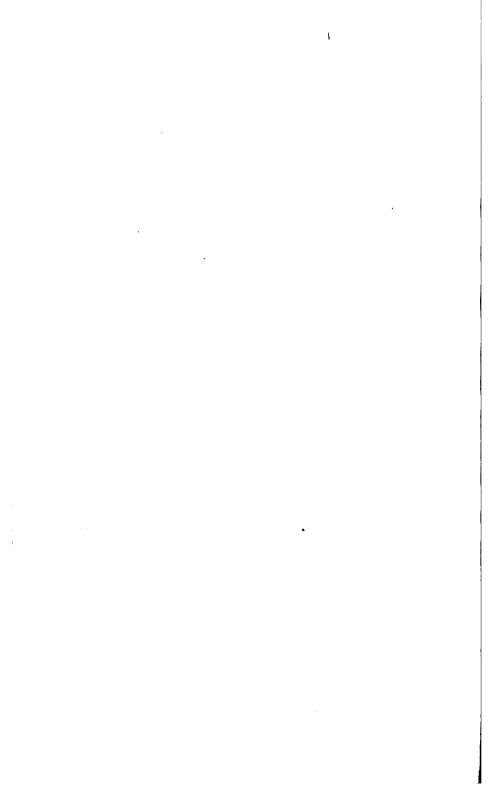
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# CASES ARGUED AND DETERMINED

IN THE

# Supreme Court of Georgia,

#### AT ATLANTA.

## FEBRUARY TERM, 1888.

PRESENT-JAMES JACKSON,				CHIEF JUS	TICE.
M. J. CRAWFORD,*		•		ASSOCIATE	"
SAMUEL HALL, .				46	"
M. H. BLANDFORD.				66	"

# THE STATE OF GEORGIA vs. THE SOUTHWESTERN RAILROAD AND vice versa.

[This case was argued at the last term, and the decision reserved. Judge Bran-HAM, of the Rome circuit, presided in the place of Jackson, Chief Justice, who was disqualified.]

1. That portion of the Southwestern Railroad extending from Macon to Fort Gaines, known as the main line, and also the section from Fort Valley to Columbus, which may be considered as a part of the main line by reason of its purchase under the act of March 4, 1856, and its consolidation with that road in 1868, except that portion of the line between Americus and Smithville (which is part of the old Georgia and Florida Railroad) is subject to a tax of one-half of one per cent. on its net annual income, and not to the ad valorem tax imposed on the property of the citizens of the state under general laws. That portion of the road which lies between Americus and Albany, and which became a part of the Southwestern Railroad by purchase, under the act of 1859 (p. 229); that portion known as the Arlington branch, extending from Albany to Arlington and recently built to Blakely; that portion known as the Cuthbert branch, extending from Cuthbert junction (one and a half miles from Cuthbert) to Eufaula, is subject to the ad valorem tax.

<sup>\*</sup>Justice Crawford having died during the summer vacation, before the close of the February Term, 1833, Hon M. H. Blandford was elected to succeed him.

- 2. The negotiations between the two successive attorneys general and the attorney of the company in this case amounted to nothing more than the valuation by them of that portion of the road lying between Americus and Albany, conceded to be subject to the ad valorem tax, and an agreement to pay tax thereon. If its effect were to release the company from ad valorem tax on the Arlington and Eufaula branches of the road, as well as to release it from further taxation on the Americus and Albany section for those years, it would be a mistake which might be corrected.
- (a.) This was not an attempt to compromise a debt due the state at less than the amount due, nor at a less rate of taxation than that due, nor to release the company from the ad valorem tax charged by the act of 1874 on the Arlington and Eufaula branches. Were it otherwise, the attorney general had no power to make any such contract or compromise, or to release the company from any part of the ad valorem tax imposed.
- (b.) Nor would the governor have power to make any such contract or release; he could not do more than suspend the collection of the tax until the meeting of the next general assembly.
- 3. After executions for taxes had been issued against this company by the comptroller general, contested, carried to the Supreme Court of the United States, and two-thirds or more of the company's road and property had been relieved from the ad ralorem tax, the company ought to have made a new or revised return. Having failed to do so, the comptroller general was authorized to correct the original returns and to assess that portion of the road and property subject to the tax from the best information he could procure, and order the fi. fas. to proceed for so much of the tax as was then due and unpaid. Had he done so, it would have been the act of the state.
- (a.) But in this case the comptroller general did not, either personally or by ratifying the assessment of another, assess the property, as claimed by defendant. When the fact of agency is to be proved by the subsequent ratification and the adoption of the act by the principal, there must be evidence of previous knowledge on the part of the principal of all the material facts. If the material facts be either suppressed or unknown, the ratification is invalid.
- (b.) Whether the comptroller general could, under any circumstances, delegate the power conferred on him by law, or ratify in an informal way the act of another in such a matter. Quære.
- 4. If an unauthorized entry of settlement was placed upon f. fas., and they were placed by the clerk among the settled papers in his office, a petition to vacate such entry was a proper remedy.
- 5. Fi. fas. having been issued by the comptroller general under the act of 1874, and being before the court on issues involving payment and satisfaction, and the valuation of certain branches, with a condi-

tional tender of a balance which might be due, the whole case was before the court and jury, and the latter were authorized, under the charge, to assess the value of the property; and they were not limited to a mere determination of the question whether the company was liable to pay the tax, leaving the assessment to the comptroller general or assessors.

- (a.) If §§839 and 840 of the Code apply at all to returns made to the comptroller general, there was no separate return of those portions of the road subject to the tax at an undervaluation.
- (b.) Assessments of corporate property for tax accruing after the act of 1877 and that of 1878—Code, §§826 (d), 833 (a)—are subject to the provisions thereof; but these cases having arisen before the passage of those acts, are not subject to the objections of the dissenting opinion in 62 Ga., 501.
- 6. While, in submitting the issues to the jury, it might have been an inappropriate form of expression for the judge to charge, "now there are these two propositions that are before you, one of the state claiming taxes, and one of a road that is trying to keep from paying the taxes"; still, taken in connection with the balance of the charge on this subject, the jury could not have misunderstood the questions submitted to them.
- (a.) Two theories were submitted: first, that the state claimed that, in fixing the value of the section and branches of the road subject to tax, the jury should value the same in connection with and as a part of the whole road, according to the value of the whole line, estimating the value thereof according to the number of miles, by the pro rata of a single mile; second, that the company claimed that the section and branches should be valued at their separate, intrinsic, isolated value, apart from the connection of the main road:
- Held, that this rule, in connection with the balance of the charge, is more favorable to the company than that recognized in 92 U.S., 605. In such cases, any rule is uncertain and unsatisfactory. No one given rule can with legal certainty be adopted; but the rule or rules submitted to the jury should let in all the evidence and every view of the subject that would shed light upon it.
- 7. The verdict of the jury is supported by the evidence.
- (a.) The rule adopted by the jury is not fixed as an absolute rule for the future assessment of this property. It must be assessed at all times as the property of other people at its actual market value, and future returns are subject to the Code, §§826 (d.), 833 (a.)
- 3. Taxes are not debts in the ordinary sense of the word, so as to bear interest as liquidated demands. They are not contracts, either express or implied; they cannot be collected by suit at law in the absence of express statutory provision, and they are not the subject-matter of set-off. Our system for enforcing the payment of taxes is by penalties, and not by interest.

- (a.) Where the circumstances raise an implied contract, or where there is an express contract to pay, the rule would be different; such as defaulters having in their hands public money, persons at whose instance or for whose benefit tax fi. fas. have been taken up and docketed, under Code §891 (a), and in cases of vexatious or unfounded litigation against the rights of the state. Such facts do not appear in this case, and the court was right in requiring interest to be written off from the verdict.
- (b.) The taxes found to be due bear interest from the date of the verdict.
- The record is indefinite as to the payment of a pro rata part of the income tax in 1874. If such payment was made, credit should be allowed for it.
- There was no error in the remaining grounds of the motion for new trial.
- Directions given to the court below. May 1, 1883.

Railroads. Tax. State. Officers. Attorney General. Comptroller General. Governor. Interest. Charge of Court Before Hon. R. H. CLARK, Judge of city court of Atlanta, presiding in place of Judge HILLYER, disqualified. Fulton Superior Court. October Term, 1882.

Reported in the decision.

CLIFFORD ANDERSON, attorney-general; ROBERT TOOMBS; SAMUEL BARNETT, for the state.

A R. LAWTON; R. F. LYON, contra.

Branham, Judge.

This case was tried in Fulton superior court under the provisions of the act of 1874, and the jury, on the 28th of January, 1882, rendered a verdict against the defendant, the Southwestern Railroad Company, for \$6,370.00 principal and \$2,675.40 interest thereon for the balance of taxes for the year 1874, and for the same principal sum, and \$2,229.50 interest thereon, for the balance of taxes for the year 1875, on the defendant's road.

The defendant moved for a new trial on the grounds set-

forth in the motion, and the court, on the hearing thereof, granted a new trial, unless the plaintiff should, within fifteen days, write off from the verdict \$2,480.00, this being the balance of taxes found by the jury to be due on the Americus and Albany branch of defendant's road, and should also write off all the interest found by the jury on both principal sums. This the plaintiff declined to do.

The defendant assigns error on the refusal of the court to grant a new trial on all the grounds contained in the motion, except the two on which the motion was, on terms, granted.

The plaintiff, by cross-bill of exceptions on the same record, assigns as error the order of the court granting a new trial on the terms stated. Both cases were argued together.

1. That portion of the Southwestern Railroad extending from Macon to Fort Gaines, known as its main line, and also the section from Fort Valley to Columbus, which may be considered as a part of its main line, by reason of the purchase thereof by the Southwestern Railroad Company. under the act of March 4th, 1856, and its consolidation with that road in 1868, except that portion of the line lying between Americus and Smithville, which is part of the old Georgia and Florida Railroad, is subject to a tax of onehalf of one per cent, on its net annual income, and is not subject to the ad valorem tax imposed on the property of the citizens of Georgia by its general laws. That portion of the road heretofore constituting the Georgia and Florida Railroad, and which lies between Americus and Albany, and which became a part of the Southwestern Railroad, by purchase under the act of 1859, page 229; that portion known as the Arlington branch, extending from Albany to Arlington and recently built to Blakely; and that portion known as the Cuthbert branch, extending from Cuthbert junction, one and a half miles from Cuthbert, to Eufaula. is subject to the ad valorem tax. 92 U.S., 676; 64 Ga., 783. Decision of this court, by Underwood, Judge, not yet published.\*

<sup>+68</sup> Ga., 811 (Rep.)

These rulings are well settled by the Supreme Court of the United States and by this court, and are no longer open questions.

The Americus and Albany section is thirty-six and a half miles long and cost to build it \$435,800.00. The Arlington branch is thirty-five and a half miles long, excluding the extension to Blakely, which is not involved in this controversy, and cost to build it \$460,000.00. The Cuthbert branch is twenty-three and a half miles long, and cost tobuild it nearly \$500,000.00. On the 2d of October, 1874. the comptroller general issued a tax f. fa. under the railroad tax act of 1874, against the Southwestern Railroad Company, for the ad valorem tax claimed to be due by that company for that year, on its road bed and appurtenances and other property for the sum of \$28,203.29. On the 6th of December, 1875, the comptroller general issued a similar fi. fa. for the same sum for the taxes claimed to be due by the company for the year 1875. These f. fas. were based on the returns of the president of the company, made in pursuance of the act of 1874, and from which it appeared that the whole property of the company was valued at \$5,640,659.99. The fi. fas. were levied on a portion of the company's property, and affidavits of illegality filed asprovided by the act of 1874, the levies suspended, the papers returned to Fulton superior court, and the casestried, with the results heretofore stated.

A former case had been made by illegality to these same fi. fas. brought to this court (see 54 Ga., 401), and reviewed by the Supreme Court of the United States in 92 U.S., 676. The object of that case was to determine whether the property of the company was liable to the ad valorem tax, notwithstanding its charter exemption beyond one-half of one per cent. on its net annual income, by reason of the consolidation of its road, in 1868, with the Muscogee Railroad, under the act of 1856. After the decision had been rendered on this question by the Supreme Court of the United States, in favor of the company, the following correspond—

ence took place between Attorney General Hammond and Ely, his successor, and General A. R. Lawton, the attorney of the company:

"ATLANTA, GEORGIA, May 25, 1876.

"General A. R. Lawton, Savannah, Ga.:

DEAR SIE—You have seen decision of Supreme Court of the United States, by this time, in Central Railroad tax case. We may have to contend further as to the Southwestern Railroad, unless we can agree upon the value of so much as is between Albany and Americus, which is taxable under act of 1859. Yours,

N. J. HAMMOND, Attorney General."

"SAVANNAH, GEORGIA, May 29, 1876.

" N. J. Hammond, Atlanta, Ga .:

DEAR SIR—Your letter of the 21st inst. is received. I will ascertain all about the Southwestern Railroad from Americus to Albany, and when I know the facts, will advise a compliance with law; but don't be impatient now. Your litigation has resulted in substantial benefit to the state, and you should feel amiable.

Yours truly,

A. R. LAWTON."

"ATLANTA, GEORGIA, September 5, 1876.

"General A. R. Lawton, of Savannah, Ga., Atlanta, Ga.:

Dear Sir—I saw Mr. Powers, and he referred me to Mr. Boifeuillet. He wrote me as follows: This company (Southwestern Railroad Company) agreed, August 1st, 1856, to purchase the South Georgia and Florida Railroad from Americus to Albany for \$400,000 (four hundred thousand dollars), payable in stock of this company at par, and payable when the road was finished in sections of thirteen miles each. The first payment was made when the road was finished to Sumter City, in December, 1856. Total cost of the road when finished to Albany, including extras, \$435,800 (four hundred and thirty-five thousand and eight hundred dollars). Distance from Americus to Albany, thirty-six miles.

I find its history in compilation of the annual report of the Southwestern Railroad Company, pages 81, 236 and 237. As the stock is as fixed in value as the other stock, I see no difficulty in our adjusting the Southwestern Railroad tax on the basis of \$435,800. Consider, and let me know your views on the subject.

Yours. N. J. Hammond. A

N. J. HAMMOND, Attorney General."

"ATLANTA, GEORGIA, November 29, 1876.

"General A. R. Lawton, Savannah, Ga .:

DEAR SIR—In a few weeks I must make my annual report. What about the new trial, Southwestern Railroad case? If you can agree upon taxing the old Florida and Georgia stock, we can adjust the matter.

Respectfully,

N. J. HAMMOND, Attorney General."

"SAVANNAH, GEORGIA, December 11, 1876.

"Hon. N. J. Hammond, Esq., Atlanta, Ga.:

DEAR SIR—Since I last saw you I have been "hurrying up" the prompt settlement of the tax cases now on hand, and the returns and payments for the present year. The proper officers of the railroad company are busily engaged in this service. The enclosed letter of Mr. McIntyre, the book-keeper, shows that the tax of 4-10 was first imposed on the return for each of the years 1874 and 1875, and then 25 per cent. added. How is this? The taxes were to be at the same rate as other property, and I am not aware of any authority for this addition of one-fourth. Perhaps there is some law or authority which has escaped me; but as we have acted in good faith and almost "pon honor," in this whole matter, I beg you to confer with the comptroller general and let it be understood. We are now anxious to settle up.

Yours truly,

A. R. LAWTON."

"SAVANNAH, GEORGIA, December 24, 1876.

"Hon. N. J. Hammond, Atlanta, Ga .:

DEAR SIR—I return you the statement of items in settlement of the railroad tax case, with my signature to it. The "returns" have been duly made for this year's taxes, and the treasurer will at once pay the tax to the comptroller general.

Yours truly,

A. R. LAWTON."

"ATLANTA, GEORGIA, January 18, 1877.

"General A. R. Lawton, Savannah, Ga .:

DEAR SIR—As my official term expires by the qualification of Hon. Robert Ely as my successor, to-day, in obedience to your request I herewith return yours of 10th inst. The offer I think a good one, all things considered, and if you wish, I think I can have it accepted.

Respectfully,

N. J. HAMMOND."

"SAVANNAH, GEORGIA, January 16, 1877. "Hon. N. J. Hammond, Atlanta, Ga.:

DEAR SIR—I write hastily to say that if you will have time before you are "out of office," I will consent to the payment of tax at estimated value of \$400,000 from Americus to Albany for the two years that executions were issued, and I will see the money paid promptly to you, so that those cases can be finally disposed of at once. This is a higher value than we would now return the property at, but will settle on those terms, as that was what we paid the South Georgia and Florida Railroad Company for it. If this letter does not reach you in time to close the cases during your term of office, please do not consider the letter official and return it to me.

Yours truly,

A. R. LAWTON."

"SAVANNAH, GEORGIA, January 20, 1877.

Hon. N. J. Hammond, Atlanta, Ga.:

DEAR SIE—Your letter of the 18th inst., returning mine of the 16th,

is just now before me. On consideration, I send you the letter again, and beg that you see the arrangement carried out for me as you kindly offer, and have the cases finally closed.

Very truly yours,

A. R. LAWTON."

"ATLANTA, GEORGIA, January 26, 1877.

"Hon. A. R. Lawton, Savannah, Ga .:

DEAR SIR—Your proposition as to my settling Southwestern Railroad tax cases is being considered by Mr. Ely, and I think will get a consent to-morrow.

Yours, etc.,

N. J. HAMMOND."

"ATLANTA, GEORGIA, January 22, 1877.

4 Hon. R. N. Ely, Attorney General's Office, Atlanta, Ga .:

DEAR SIR-In 1852 the Georgia and Florida Railroad Company was incorporated with authority "at any time to incorporate their stock with the stock of any other company on such terms as may be virtually agreed upor by such companies." In 1856 the Southwestern Railroad Company agreed to purchase said company's road from Americus to Albany at \$400,000, payable in stock of the Southwestern Railroad Company at par. The first payment was made in 1856. and the last in 1858. This purchase was consummated under act of 1859. See acts of 1859, pages 229, 230. The actual cost of the road and extras was \$435,800. During last summer I proposed to General Lawton to settle the case of the State vs. The Southwestern Railroad Company, in which the Supreme Court of the United States had granted a new trial, because it was not taxable ad valorem for tax of 1874, and the one for tax of 1875 pending, and to abide result of former, by paying tax for each year ad valorem for 1874 and 1875 on the purchase part, which is taxable ad valorem, by putting its value at \$435,000. Pending these negotiations, I received, on the last day of my official term, a proposal for payment of tax at estimated value of \$400.000 from Americus to Albany, for the two years that executions were issued, 1875 and 1874. Because I was out of office. I so advised General Lawton, saving I would accept had I then authority. He has authorized me to make the same proposal to you. If you accept, I will get the \$4,000 at once and pay in settlement. I don't think you could make more by trial. You might not make so much. Indeed, General Lawton says it would not now be given in as worth so much. To accept settles those cases, and fixes that property for taxstion in futuro. What shall I do?

Yours,

N. J. HAMMOND."

" JANUARY 31, 1877.

"Hon. N. J. Hammond, Atlanta:

DEAR SIE—I am instructed by his excellency, the Governor, to say, in reply to yours of the 22d inst., that inasmuch as you had virtually made a settlement with Gen. A. R. Lawton, representing the Central

Railroad, before retiring from the office of attorney general, of the tax due by the Southwestern Railroad, extending from Americus to Albany, and as no reason occurs why the same is not a good and favorable settlement for the state, that you be authorized to conclude the same on the terms mentioned.

Very respectfully, your obedient servant,

R. N. ELY, Attorney General."

"ATLANTA, GEORGIA, January 30, 1877.

"General A. R. Lawton, Savannah, Ga .:

Dear Sir—After considering, Mr. Ely agrees to accept your proposition to settle the Southwestern Railroad tax cases for 1874 and 1875 at basis of \$4,000. Send me the money. I will pay and take proper receipt for you. I suppose you must pay costs also, and \$10 would cover unpaid costs.

Yours,

N. J. Hammond,

A. W. H. & Son."

"SAVANNAH, GEORGIA, February 5th, 1877.

" N. J. Hammond, Esq., Atlanta, Ga.:

DEAR SIR—Mr. Cunningham has handed me your letter to him of the 3d inst. I now hand you herein a check for \$4,010 to cover tax and balance of costs on the fragment of railroad from any deduction for tax paid on income, such a receipt as will be a voucher for the cashier. Yours truly, A. R. LAWTON."

"ATLANTA, GEORGIA, February 8, 1877.

"Hon. A. R. Lawton, Savannah, Ga .:

DEAR SIR—Enclosed I hand you receipt for \$4,000 paid by me in settlement of the Southwestern Railroad tax fi. fas. of 1874 and 1875. I have asked the clerk for his receipt for costs, which will be sent you. You paid the costs in the first. I send you my check on John H. James for balance, \$7.

Cash received of you for	•	bov	еp	urj	008	es,		•	\$4,0	010	00	)
Paid attorney general	for j	. f	a. E	ett	led	,			•			\$4,000 00
Paid Clerk for cost,												3 00
Balance in my check	supi	a,			•	•	•	•	•			7 00
												\$4,010 00

I remain yours, etc.,

N. J. HAMMOND."

In pursuance of the agreement of the attorneys set forth in these letters, Attorney General Ely, on the 7th of February, 1877, receipted the company for the sum named, \$4,000.00, setting forth in the receipt that the payment was in full settlement of the ft. fas., that the same were to be so entered on payment of cost, and made an indorsement signed by him to this effect on the ft. fas. The cost \$3.00,

Was paid to the clerk of Fulton superior court and receipted for by him. The clerk then placed the fi. fas. with other settled and disposed of cases, where they remained from the 8th day of February, 1877, to the 5th day of May, 1880. In the meantime, and on the 10th of February, 1877, the attorney general paid \$3,500 of the money into the treasand on the certificate of the treasurer to that effect, the comptroller general receipted him for that sum, for taxes collected on the fi. fas., and the cases were stricken from the comptroller general's docket. On the 6th of May, the attorney general moved the court to open this sett lement, made by him through Colonel Hammond, with General Lawton, the company's attorney, and for leave to with the ft. fas. on the ground that the settlement 1888 made without authority and under a mistake. coart on demurrer overruled the motion. This court reversed its judgment and held that the mistake could becorrected at any time before record and before it was made the judgment of the court. 66 Ga., 403. The case then went back to Fulton superior court for trial, and the company, by its counsel, for cause against the granting of the petition, set forth that the settlement was made by the attorney general, with the consent of the governor, that it was a full and complete settlement of all liability on the part of the company for all ad valorem taxes due by it for the years 1874 and 1875, and that the comptroller general, who is the head of this department, having jurisdiction over the subject, was in full possession of all the facts in relation to the matter, and that he ratified and approved it. This is one of the main questions in the case.

2. The negotiations between Attorneys General Hammond and Ely and General Lawton amounted to nothing more than the valuation by them, of that portion of the road lying between Americus and Albany, conceded to be subject to the ad valorem tax, and an agreement to pay the tax thereon. No other portion of the road, or branch thereof, was in the mind of either of them at any time

during the progress of the correspondence, nor mentioned in any part of it. Colonel Hammond did not know of the act of 1859, under which the Georgia and Florida Railroad was purchased by the company, and by reason of which this part of the road was subject to the tax, until after the first case, made on these ft. fas., had been taken to the Supreme Court of the United States, say in 1876. nor did he know of the existence of the Arlington branch until it was held subject to the tax by this court in 64 Ga., 797. Attorney General Ely began his investigation of this matter in 1877, and became convinced that the Arlington and Eufaula branches were subject to the tax for these years, from some "favorable decisions" of this court in 1879. The subject-matter of the agreement was the old Georgia and Florida Railroad, a section of the company's road. thirty-six and a half miles long, which cost \$435,800.00. It required fifteen letters, in nearly every one of which this section of the road alone was mentioned, to reach the conclusion. By no possible construction can these letters embrace any other subject-matter than the Georgia and Florida Railroad, known and mentioned as the Americus Yet, it is contended by counsel for the company that this agreement of their attorney with the attorney general is not only binding on the state, but that its effect is to release the company from the ad valorem tex on the Arlington and Eufaula branches of the road, as well as to release it from further taxation on the Americus and Albany section for those years. If such were its effect, then no one can doubt that there was a mistake in making it. and such a mistake as was clearly subject to correction. Delaware Div. Canal Company vs. Commonwealth, 50 Penn. St. 408.

The position of counsel for the company requires us to say, were we to sustain it, that this agreement, so plain and unmistakable as to its subject-matter, embraces not only the old Georgia and Florida Railroad, known as that section of the road between Americus and Albany, but this

The State vs. The Southwestern Railroad and vice versa.

road and two other distinct branches, built under different charters or amended charters, and at different times; i. e.:

The Georgia and Florida Railroad, built in 1856-7, 361/2	
miles long, at a cost of	\$435,800.00
The Arlington branch built in ——, 35½ miles long,	
at a cost of	
The Eufaula branch, built in 1859, 231/2 miles long, at a	
cost of	500,000.00

Three roads aggregating 95½ miles of road, at a cost of \$1,395,800.00 Instead of one road 36½ miles long at a cost of . . . . . 435,800.00

The attorney general and General Lawton, the attorney of the company, did not attempt in their correspondence to compromise a debt due the state at less than the rate of taxation or the amount due on the value of the property; nor did they attempt to release the company by what was done by them from the ad valorem tax charged by the act of 1874 on the Arlington and Eufaula branches of the road. Had they done so, the attorney general had no power to make any such contract of compromise, or to release the company from any portion of the ad valorem tax imposed by the act on the property of the company. There is no law of this state that confers on him any such authority. The governor had no such power. He can only "suspend the collection of taxes, or some part thereof, until the meeting of the next general assembly, and he cannot otherwise interfere with the collection thereof." Code, 75.

3. The comptroller general is authorized by the act of 1874, in the absence of a legal return by the company, or on failure to pay the tax assessed against its property, "to enforce the collection of the same in the manner provided by law for the enforcement of taxes against other incorporated companies," required by law to make returns to the comptroller general; that is to say, if this company fails to make its returns or to pay the taxes for which it is liable, the comptroller general is required to assess the tax, in his discretion, and when there is no return by which to assess it, he must do so from the best information he can

procure, and issue execution against the company for the amount of taxes due according to law, together with the cost and penalties. Code, §§876, 881.

The executions were already issued. The decision of the Supreme Court of the United States, in 92 U.S., made in 1876, relieved two-thirds or more of the company's road and property from the ad valorem tax, and the company ought then to have made a new or revised return. Having failed to do so, the comptroller general was authorized to correct the original returns and to assess that portion of the road and property subject to the tax, from the best information he could procure, and order the ft. fas. to proceed for so much of the tax as was then due and un-Had he done so, it would have been the act of the state. Has he done so, either expressly or by any act of his ratifying any assessment of any part of said property made by any other person? It is not pretended that he has made any express assessment. But it is claimed that the attorney general, by the agreement made with the company's attorney, hereinbefore set forth, assessed the company's property subject to the tax, and that the company settled with him in full for all tax due the state, and that the comptroller general approved and ratified said settlement, and that the state is bound thereby.

What is the law of the case? "When the fact of agency is to be proved by the subsequent ratification and adoption of the act by the principal, there must be evidence of previous knowledge on the part of the principal of all the material facts." Hardeman & H. vs. Ford, 12 Ga., 205. If the material facts be either suppressed or unknown, the ratification is invalid. Orrings vs. Hall, 9 Peters, 608. Keeping this rule of law in view, and without deciding whether the comptroller general could under any circumstances delegate the power conferred on him by the law, or ratify in an informal way the act of another in such a matter, let us see what the facts are.

W. L. Goldsmith was comptroller general in 1874-5.

His testimony was taken by interrogatories in this case. Yet, strange to say, no information was sought or given by him as to his knowledge in relation to this alleged settlement. He does not say a word on the subject. On the 10th of February, 1877, the treasurer addressed the following certificate to the comptroller general:

"Treasury of Georgia, Atlanta, Ga., Feb. 10, 1877.

"This is to certify that R. N. Ely, attorney general, has paid into the treasury the sum of thirty-five hundred dollars, tax collected on fi. fas. vs. Southwestern Railroad 1874 and 1875, for which you are authorized to give a receipt.

J. W. Renfroe, Treasurer."

The comptroller general receipted Mr. Ely as follows:

"FEBRUARY 10, 1877.

"Received of R. N. Ely, attorney general, \$3,500, tax collected on f. fas. vs. Southwestern Railroad 1874 and 1875."

The comptroller general was only authorized by the treasurer to receipt for and only receipted for \$3,500.00, so far as these papers show. The only information he got from the treasurer's certificate was that \$3,500.00 tax had been collected on these fi. fas. and paid into the treasury. The cases were stricken from the comptroller's docket by cross lines drawn across the statement of the cases thereon, and the letters "pd." appeared opposite one of the cases. When, by whom, and under what circumstances these lines were drawn and letters made, does not appear.

The comptroller general received the return of the company for the Americus and Albany branch for the years 1876 and 1877, at a valuation of \$400,000.00 for this section of the road. And from this an inference is drawn by counsel, that he had knowledge of the settlement. These returns prove no more than they contain. Beyond the fact that the sum is the same as that agreed on by the attorney general, through Colonel Hammond and the company's attorney, as their valuation of this section of the road, there is nothing in it to indicate that any attempted settlement had been made in discharge of the company's liability for all taxes for the years 1874 and 1875.

It does not appear that the comptroller general was in possession of any other facts in relation to this matter than those already mentioned, nor does it appear, as claimed in the company's affidavit of illegality, that, "with a full knowledge of all the facts and effect of said settlement, he ratified and approved" the same.

We cannot see that the position of counsel for the company is at all strengthened by the provision of the act of 1874, that the comptroller general shall be represented in court by the attorney general. This provision only authorizes the attorney general to conduct the suit or litigation, and does not delegate to him any of the duties imposed by law on the comptroller general. See 66 Ga., 403.

- 4. The ft. fas. with the entries on them, were placed among the settled papers of Fulton superior court, and were there when the petition to open the settlement and proceed with them in this case was filed. We think this petition was a proper remedy. It was, in effect, a motion to vacate an unauthorized entry of satisfaction on the f. fas. The cases were regularly in court. They began there. went through this court, on demurrer to the illegalities, to the Supreme Court of the United States, and back on a reversal of the judgment of this court, with direction to this court to reverse the order of the superior court sustaining the demurrer. 54 Ga., 403; 92 U.S., 677. reinstated those cases, and they stood for trial in Fulton superior court. From the attorney general's entry on the fi. fas., they appeared to be settled, when in fact they never had been settled, and it was competent for the court on petition to strike the entries and to order the ft. fas. to proceed. But we do not think this a material question. The state might have ignored these entries and ordered the f. fas. to proceed without application to the court. a case it would have been met with the same remedy and defence, in the same jurisdiction as that filed in this case
- 5. A good deal of stress was laid by counsel for the company on the charge of the court, as set forth in the

18th and 19th subdivisions of the 15th ground of the motion for a new trial, relating to the power of the jury to assess the property for taxation, counsel for the company claiming that the jury were only authorized to determine the isolated question of the company's liability to pay the tax, and that the power to assess the property is vested alone in the comptroller general, with an appeal to assessors in cases of disputed values, as provided by Code, §§826, 832, 881, 876, 839, 840.

These cases were in court for trial on all the issues made by the pleadings or involved therein. One ground of illegality was an alleged payment of \$4,000 in full satisfaction of the fi. fas. Another ground was the value of the Arlington branch, alleged to be only \$120,000, and the value of the Eufaula branch, alleged to be only \$270,000. and the defendant made a conditional tender of \$600 tax on the Arlington branch, and of \$1,350 on the Eufaula To have restricted the jury to the position of counsel, would have excluded these grounds from their consideration. The condition of the illegality bonds requires the company to pay the ft. fas., if held liable thereon by How could the court enforce these bonds, in case of default, if it was not authorized to find the amount due on the fi. fas. How can the amount be ascertained without a valuation of so much of the property as is subject to the tax: and who is to find the value, the court or the jury? Certainly the jury, under the charge of the court. The remedy provided by the act of 1874 is an affidavit of illegality, to be tried as other illegalities. of the defendant to the tax is to be determined under its provisions, and the defendant is authorized by the terms of the act, on compliance with its conditions, "to resist the collection of the tax therein provided for." It is not only the mere "liability" of the defendant that is made subject to contest, but the "collection" of the taxes also. It is not the policy of the law to subject the determination of any case. by piecemeal, to two separate jurisdictions.

The argument of learned counsel for the company, that a jury can only assess the tax in equity cases, where the rule requires the complainant to do equity by an offer to pay whatever may be due, is shorn of its strength by the pleadings in this case, for they embrace just such a tender as we have already seen.

The company made no separate return of those portions of the road subject to the tax, and if sections 839 and 840 of the Code apply to returns made to the comptroller general, then there was no return at an under-valuation, and nothing therefore for revision or correction. Assessments of corporate property, for taxes accruing after the passage of the acts of the 22d of February, 1877, and the act of 1878 amendatory thereof, Code, §§826(d), 833(a), are subject to the provisions of these acts. But these cases being only a continuation of a litigation, begun before the passage of these acts, are not even subject to the objections set forth in the dissenting opinion of Warner, Chief Justice, in Goldsmith, comptroller general, vs. The S. W. R. R. Company, 62 Ga., 501.

6. The language used by the court in submitting the theories of counsel as to the rule which should govern the jury in valuing the road, as follows: "Now, there are these two propositions that are before you, one of the state claiming taxes, and one of a road that is trying to keep from paying the taxes", while it may have been an inappropriate form of expression, when taken in connection with the balance of the charge on this subject, the jury could not have misunderstood the court as to the questions which were submitted to them and to which this sentence referred. theories are set forth in this paragraph of the charge, one being the rule as claimed by the state, and the other rule as claimed by the defendant. The state claimed that in fixing the value of the section and branches of the road subject to the tax, the jury should value the same in connection with and as a part of the whole road according to the value of the whole line, estimating the value thereof accord-

ing to the number of miles, by the pro rata value of a single mile. The company contended that the section and branches should be valued at their separate, intrinsic, isolated values apart from any connection with the main The court submitted with these theories the reasons given, in brief, by counsel why their respective theories ought to prevail, and left it to the jury to say which theory they would adopt. There is no pretence that the position of either party was incorrectly stated; nor did counsel suggest to the court that these words were likely to mislead the jury. The jury, it seems, adopted the theory of the state. This rule, taken in connection with the balance of the charge, is more favorable than that referred to and recognized in the railroad tax cases, 92 U.S., 605, which is, where railroad companies are solvent, that the market value of a railroad is the value of its stock, plus the value of its The stock of railroad companies of recent years has been subject to great fluctuations in value. It has been a fruitful source of speculation, and very frequently the value of its stock and bonds will not afford a safe rule as to the market value of the road. Any rule, as the Supreme Court of the United States said in the cases referred to, is more or less uncertain and unsatisfactory. No one given rule can. with legal certainty, be adopted, and for this reason many of the requests to charge the jury, made by the companv's counsel, are objectionable, and were properly refused. The market value of the section, which was a part of the main line, and of two branches, which fed the main line and drew to it freights for a long haul within an area of fifty miles or more adjacent to them, and which but for them might have taken another line, were to be ascertained The rule or rules submitted to the jury should let in all the evidence and every view of the subject that would shed light upon it, such as the value of the whole line, the separate value of the section and branches, the length of each, the cost of each, the cost of reproducing the whole line or any part thereof, the market value of the whole

and of each part thereof, the market value of its stock and bonds, the net income of the road and of the stock, and the proportion which the business done on the section and branches in controversy bears to that done on the whole line. 92 U. S., 575; 64 Ga., 800. Unpublished case before cited.

Any evidence that would in any way aid the jury in ascertaining the market value of those portions of the road subject to the tax should be admitted, and the property should be fairly assessed as the property of private citizens of the state at its true market value. All the evidence offered by either party in this case was admitted; none was The evidence took a wide range, extending beexcluded. yond actual facts, to the opinions of several expert witnesses sworn on the trial. The court, in addition to the two theories of counsel, charged the jury, "You are to assess the unpaid taxes upon these fi. fas., for which the road is legally liable to the state. The claim in this case upon the part of the state is for the taxes due upon the property from Americus to Albany, from Albany to Arlington, from Cuthbert to Eufaula; now you are to assess the value of these particular portions of the road, and after you have ascertained their value from the evidence in 1874 and 1875, then you are to assess one-half of one per cent, upon the valuation that you make in 1874 and such valuation as you may make in 1875. You are to do, under this evidence and the law I have given you in charge, what, if it were not for this issue, the comptroller general would do. under the forms of law. So you must exercise your best judgment, under the evidence and the law, and say what you find the valuation of this property to be." Judge Lyon read from a Supreme Court report, and the court continued. "All the evidence, gentlemen, is before you; you are to get at the valuation of this property from all the evidence before you. You are to look to all the evidence. I am merely stating to you the theory of the state upon the one hand and of the defendant on the other. You are to look to all

the evidence; and from all the evidence you are to come to your conclusion as to what this property ought to be assessed at by the state, the valuation that it had in 1874 and 1875."

## 7. Was the verdict contrary to the evidence?

The jury found 93 miles of the road subject to the tax (there was really 95½ miles subject), and the value of the 93 miles to be \$1,674,000.00, thus finding the average value per mile to be \$18,000. Keeping in view the rules and elements of value before stated, let us see what the facts are. Mr. Powers values the whole line at \$5,000,000.

The section from Americus to	All	ban	у со	st			•	\$435,800
The Arlington branch cost								460,000
The Eufaula branch cost								500,000

This is the original cost, and makes no allowance for subsequent improvements which increase the value of these sections of the road. The whole road is under a perpetual lease to the Central Railroad and Banking Company, with a guaranteed dividend of 7% on the stock, which in round numbers is \$5,000,000. This is the annual rental of the road. At the time this lease was made, June 24th, 1869, the bonded indebtedness of the road was \$700.000. Central Railroad Company, in addition to its guarantee on the stock, agreed to pay the principal and interest of this bonded indebtedness. These bonds were plain bonds, con-There were \$3,500,000 of tripartite vertible into stock. bonds issued after the merger of this road with the Central, and the \$700,000 of Southwestern bonds were taken up with part of these tripartite bonds. Now, estimating the guaranteed stock and the \$700,000 of original Southwestern bonds at par, according to the rule in 92 U.S., 605, we have the value of the whole line and branches, \$5,700,000. The length of the whole line is 307 miles, so this makes the average value over \$18,000 per mile. If the income on thi stock and bonds, \$399,000, rating it at 7%, is capitalized on a basis 6% for money, it would greatly increase

this value per mile. It must also be remembered that the dividends can never be less than 7%, and will be increased if the Central Railroad earns 10% in the ratio of 8 to 10, and that a stock dividend has been paid to the Southwestern Railroad Company of \$32 a share.

The true rule of valuation in this case seems to us to be, to estimate the road and branches as a whole. Nelson Tift says: "I would estimate all the parts as one road, their extensions, branches, side tracks, etc. All the parts are necessary to the financial success and value of the road, and are all representatives in the value of the stock." The road from Macon to Eufaula which embraces a part of the old Georgia and Florida Railroad, and the Eufaula branch, is operated as a main line. How can you estimate the value of any part of this portion of the main line, except as a part of the whole; and how can you value this part of the main line without estimating with it that portion of the road to Columbus? It cannot well be done, nor can the branches which feed the main lines be correctly valued except as a part of the whole. Mr. Raoul was unable to apportion the earnings between the main line and the branches, though pressed to do so by counsel for the state. There is no separate rolling stock for the branches. The value of the road and branches, of the rolling stock, and of the income, must all be considered in their entirety; they cannot be apportioned with any reasonable certainty. The verdict of the jury is supported by the evidence. We do not, however, intend to fix the rule adopted by the jury as an absolute rule for the future assessment of this property. It must be assessed at all times, as the property of other people, at its actual market value; and future returns are subject, as we have said, to Code, 826(d) and 833(a). See also 62 Ga., 501.

8. We think the court was right in requiring the interest to be written off the verdict. Taxes are not debts in the sense in which that word is ordinarily used. Code, 2056, embraces all liquidated demands arising in contract, either express or implied, or otherwise, where the sum to be paid.

is fixed or certain. We do not understand that taxes are ordinarily embraced in the term "liquidated demands." Open accounts did not bear interest until subjected thereto by the act of 1858.

In the third paragraph of section 2533, Code, taxes are mentioned in connection with "other debts," as entitled to priority of payment out of the assets of a decedent's estate. But this does not prove that they are debts in the ordinary sense of that term. Section 2571, which provides that the year's support of a decedent's family shall "be preferred before all other debts," is similar in its verbiage to that above quoted. Yet, it is plain that, notwithstanding it is thus connected with the term "other debts," it is not a debt. This court has so decided in Barron vs. Burney, 38 Ga., 264.

Taxes are not ordinary debts; they are not contracts, either express or implied. They cannot be collected by suit at law in the absence of express statutory provision; they are not the subject-matter of set-off. 7 Ab. Pr., 248; 7 La. An., 192; 1 La. An., 436; 8 Met., 393; Quincy Mass., 58; 3 Met., 520; Lane vs. Oregon, 7 Wall., 80; Packard vs. Tisdale, 50 Maine, 376.

In Savings Bank vs. United States, 19 Wall., 227, an action of debt for the recovery of an internal revenue tax, due by that bank, was sustained on general principles, but more particularly on the express provisions of the statute. Mr. Justice Bradley and Field dissenting on the ground that the action would not lie for the recovery of a tax of the kind, until it had been first entered on the assessment roll. No reference whatever was made to the case in 7 Wall., 80, before cited. The jury found a special verdict, embracing the principal sum, and \$1,100.00 as interest, if the court should be of opinion the plaintiff, under the law, was entitled to recover it. The circuit court gave no interest, because the bank was not reprehensibly in default, and because its refusal to pay the tax was induced by the inconsistent action and the conflicting opinions of the de-

partment. See page 231 and note. The question of interest was not raised in the Supreme Court, and none was allowed, notwithstanding several years had elapsed after the tax became due.

In the case of Delaware Division Canal Company vs. Commonwealth, 50 Penn. St., 409, interest was allowed; but this was by reason of the act of 1811, which provided that "all balances due the commonwealth on accounts settled agreeably to this act shall bear interest from three months after date of settlement until paid." See page 405.

In the City of Dubuque vs. Illinois Central Railroad Company, 39 Iowa, 56, an important case argued by quite a number of attorneys representing this and other companies interested in the decision, the main question decided was, that the general assembly had no power to release the railroad company from the payment of taxes levied by the city for the year 1871, by subsequent legislation. Beck, J., held that the tax was a debt, and that there was an implied contract on the part of the defendant to pay it, which the general assembly could not impair. The other members of the court placed their opinions on constitutional grounds. Beck, J., also held that an action at law was maintainable for the recovery of taxes under special circumstances, but not in ordinary cases; but this ruling was not concurred in by the other three judges. Cole, J., expressly dissented from it, upon the ground that the tax was not a "debt which could be recovered by an action at law." The court, citing the authorities, said some of them "hold that taxes do not bear interest unless it is so prescribed by statute." See pages 75, 76, 72, 90, 53. The question of interest was not decided further in this case.

"The assessment of taxes does not create a debt that can be enforced by suit, or upon which a promise to pay interest can be implied. It is a proceeding in invitum," not founded upon contracts, express or implied. Shaw vs. Picket, 26 Ver., 482. "A debt universally bears interest

from the time it is due. A tax never carries interest. No instance, it is believed, can be found since the formation of the government where a claim for interest on taxes has been made or enforced." The City of Camden vs. Allen, 2 Dutcher, 399; Perry vs. Washburn, 20 Cal., 318, 350. has not been customary to collect interest on ordinary tax f. fas. in this state. These f. fas. stand on the same footing with those against the people of the state for their taxes. Our system for enforcing the payment of taxes is one of penalties and not interest. See Code, 826(g), 854, 876 to 880. 910. In the latter section it is expressly provided that the penalty shall include interest. In the absence of statutory provision, taxes do not ordinarily bear interest. Where the circumstances raise an implied contract, or where there is an express contract to pay, the rule would be different. such as defaulters having in their hands public moneys, persons at whose instance or for whose benefit tax fi. fas. have been taken up and docketed on the execution docket, under Code, \$891(a), and in cases of vexatious or unfounded litigation against the rights of the state.

In Bank vs. Commonwealth, 10 Penn. St., 453, it is said, "Where the fact of non-payment is ascribable to mutual misapprehension, or to the laches of the creditor, interest is not demandable as of course. The detention must smack of injustice to make the debtor liable." And in 64 Ga., 800. this court suggested, but did not decide, that the payment of interest from the time the tax was claimed by the officers of the state might depend on the question as to "whose fault caused the delay." The state claims the company was first at fault, and that it owes interest from the end of the years 1874 and 1875. The state issued these fi. fas. for the taxes of these years, for over \$28,000 for each year, based upon the value of the whole property of the company. The defense was successful in the Supreme Court of the United States in 1876, and after a protracted litigation, over two-thirds of the company's property was found to be exempt from the ad valorem tax. On the 6th

of May, 1880, the state again moved, on the petition filed in this case, on these same f. fas., without the entry of any credits thereon. One ground of illegality is that the tax on the defendant's wild lands, returned at \$9.990.50; on 6.417 shares of stock in other railroads, most of which is worthless, returned at \$311,700.00, on some of its bonds returned at \$69,000, (stated in 62 Ga., 497, \$6,900); on its steamboat stock, returned at \$24,719; on its notes, returned at \$11,250,—amounting in the aggregate to \$426,659.50, was, on the 19th of April, 1880, before this case was renewed. paid by the Central Railroad Company for the Southwestern, and this was admitted by the state on trial of this case. The failure of the state to credit the fi. fas., so as to release that portion of the road exempt under its original charter from the ad valorem tax, and so as to release the above stated property from the lien of the fi. fas., rendered this part of the defense necessary. The fi. fas. were proceeding In these respects the state was at fault. for too much. The act of 1874 only seeks to tax the property of railroads as the property of other citizens is taxed, and the remedy therein provided was allowed for the purpose of settling fairly and legally the liability of the roads to the tax. company, in joining issue with the state, did nothing more than it was invited by the state to do. Besides this, the jury found interest for six years on the tax of 1874, and for five years on that of 1875, when the tax was not claimed in this case until the 6th of May, 1880, this being the time when the petition to re-open the fi. fas. was filed; and in this case no separate assessment was made, until it was done by the jury on the trial of the case. See, also, 18 Ga., 177; 2 Kelly, 376; Code, §812. Of course, the taxes found to be due in this case bear interest from the date of the verdict.

9. Counsel for the company claim credit for a pro rata part of the income tax paid in 1874-5, and stated in the argument the payment of it was admitted by the state. The record is indefinite in this respect. If the tax was paid, it is proper that the court below should direct that a pro rata part of

the principal sum so paid be credited on the amount due by the company, and we so direct.

10. To the first and second grounds of the motion: an entry of satisfaction on a fi. fa. by the attorney of record, is prima facie valid and binding on the plaintiff. In this case the entry indicated a "settlement," not a full satisfaction of the fi. fas. The documentary evidence and the company's returns, introduced by the state, were sufficient under the pleadings, and in view of the legal question raised thereby, to support the ruling of the court.

The reference in the charge to the Perry branch did no harm. The jury were told it was not in the case, and they did not embrace it in their verdict.

The third and fourth grounds assume that the state was legally a party to the alleged settlement. The eleventh ground of the motion excluded from the consideration of the jury the question of mistake, and was not authorized by the evidence. As we have seen, the comptroller general only receipted for \$3,500 tax collected on the ft. fas.

The state was reasonably diligent in proceeding with these fi. fas., under all the facts of this case.

The remaining grounds of the motion are covered by the opinion.

11. In the case of the State vs. The Southwestern Railroad Company, the judgment is reversed, with directions to the court below to pass an order remitting the interest only, and with these modifications allowing the verdict and judgment to stand as rendered, the railroad company to pay the cost of its own bill of exceptions, and the state to pay the cost of its bill of exceptions.

The case of the Southwestern Railroad Company vs. The State is affirmed.

Montgomery et al. vs. The Trustees of Masonic Hall, and vice versa.

# Montgomery et al. vs. The Trusters of the Masonic Hall in the City of Augusta, and vice versa.

[This case was argued at the last term, but was ordered re-argued at the present term.]

- 1. The defendants, under the facts of this case, had a perfect prescriptive title to the lot on which they pulled down the wall involved in controversy. The plaintiffs had no estate in remainder, but held under the will of their mother; if the possession of defendants was adverse to her and her trustees, it was adverse to plaintiffs.
- (a.) An ante-nuptial agreement provided that certain property of the wife should be conveyed by the intended husband to trustees for her; that she should have power to make a will, and in case her husband should survive her, the trustees should convey and dispose of the said lots or parcels of land as the said wife might by her will appoint, the disposition to take effect as to one-half of the lots immediately after her death, and as to the other half after the death of her husband; should she survive her husband, "said trustees, and their successors, shall hold the said lots or parcels of land for the use and benefit of (the wife) during her lifetime, and not to be disposed of, aliened or conveyed, by mortgage or deed, or in any other way, but by will, and for the use, maintenance and education of her issue and their descendants in such manner as the said (wife) may and shall direct." If the wife died intestate, provision was made as to the disposition of the property:
- Held, that in case the husband survived, the wife had power to devise the property, subject to a life use of one-half by him; if she survived, her right of disposition was absolute; in neither case was her right to devise limited to certain beneficiaries marked out by the settlement. To so hold would destroy all her testamentary power.
- (b.) The meaning of the clause in regard to the maintenance and education of her issue and their descendants, is that the trustees should hold the property for her use, and for the use of her children and descendants during her life as she might then direct; they did not limit her power of disposition by will.
- (c.) The husband could not alter this power by post-nuptial deed; nor was it done; the deed substantially followed the settlement; and a provision therein that the wife should have power to make a will "in pursuance of the provisions of this settlement, and of the precedent covenant," will be construed to refer to the rights of the husband in case of his survivorship.
- 2. The defendants held by prescription—adverse possession for more than fifty years—which presumes a grant to them from the state.

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The plaintiffs claimed under the will of their mother, and the two sides did not derive title from a common grantor.

- (a.) Owners of adjoining lands owe to each other, as incident to their juxtaposition, the lateral support of each to that of the other in its natural state, whether they derive title from a common grantor or not. If they derive title from a common grantor, that lateral support extends further than the soil in its natural condition, and embraces the superincumbent weight that may be upon it by fence, wall or other burden. If, at the time the common grantor parts with title, there are buildings adjoining each other, the right extends to the lateral support which each adjacent wall gives to the other.
- (b.) If there be between the two proprietors a party wall supporting the timbers of each, the right of each to that wall for the support it gives his building is that of a tenant in common with the other, and neither can change it so as to displace the timbers of the other so supported, or in anywise injure or make them insecure.
- (c.) A deed from the husband or the trustees of the wife in this case, would be nothing more than color of title, there being no power in either of them to convey the property.
- 3. The question of diligence in removing the wall, from which the damage arose, was one of fact; it has been submitted to the jury, and their finding was supported by the evidence.
- 4. The admission or rejection of the testimony of the witness, Gould, or of the minutes of the Masonic lodge, was immaterial, under the views just announced.
- 5. A failure to give notice to an adjoining land owner of the removal of a wall will not necessarily show negligence; if the adjoining land owner, from personal observation or otherwise, had knowledge that the work was being done, or would be done, the object of giving notice would have been accomplished; and such facts could be considered by the jury in determining the question of diligence.
- (a.) There was no such substantial error committed as requires a new trial on behalf of the plaintiffs.

September 1, 1883.

Title. Prescription. Husband and Wife. Wills. Easements. Damages. Estates. Before Judge Lawson. Richmond Superior Court. April Term, 1882.

Plaintiffs, the Montgomerys, brought case against the Trustees of the Masonic Hall for damages done to a wall of the plaintiffs. The facts were, in brief, as follows: In 1824, an ante-nuptial agreement was entered into between General W. W. Montgomery, Augustus Moore.

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guardian, and Miss Janet S. Blair, as precedent to the marriage of General Montgomery and Miss Blair. In this agreement it was provided, among other things, that the husband should settle upon trustees certain property which she had. She was to have a certain amount paid to her annually from the rents; she was given the right to make a will; and in case she survived her husband, the trustees were to convey and dispose of the lots as she might direct by will, to take effect as to one-half at once upon her death, and as to the other half upon the death of her husband, who was given a life-use in the latter half. If she survived him, the agreement provided as follows:

"And in further trust, that should the said William W. Montgomery depart this life before the death of the said Janet S. Blair, the said trustees, and their successors, shall hold the said lots or parcels of land for the use and benefit of Janet S. Blair during her lifetime, not to be disposed of, aliened, or conveyed by her by marriage, [mortgage?], deed, or in any other way than by will, and for the use, maintenance and education of her issue and their descendants in such manner as the said Janet S. Blair may direct."

The post-nuptial settlement substantially followed the ante-nuptial agreement, and contained the following clause:

"And the said William W. Montgomery hereby authorizes and empowers the said Mrs. Janet S. Montgomery, late Miss Janet S. Blair, to make a last will and testament in pursuance of the provisions of this settlement, and of the preceding covenant."

Mrs. Montgomery survived her husband and died testate, leaving all her property to the plaintiffs in this case. A part of the property covered by the ante-nuptial and post-nuptial contracts was lot number 34, on Broad street, in Augusta, Ga. Such was the title of plaintiffs.

The trustees of the Masonic Hall, in the city of Augusta, were incorporated in 1827. They bought lot number 33, just west of the Montgomery lot, and desiring ten feet more front, authorized a committee to purchase a strip ten feet wide on the opposite side of the Montgomery lot, and exchanged it with General Montgomery for a like strip lying contiguous to their lot; they obtained posses-

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sion of the strip at a cost of \$1,700.00. A notice to produce the deed from Montgomery to the Trustees of the Masonic Hall, and a bond for title covering this strip, was served by plaintiffs, but the papers could not be produced. The trustees went into possession in 1828, and have been in open, continuous, peaceable and adverse possession ever since. In 1828, they entered into a contract to have a building erected on their lot, including the ten feet which had been added thereto, which was done. There had previously been buildings on the Montgomery lot, but they had burned in 1827. After the sale, a wall was built on the Montgomery lot along the eastern line of the ten feet slip and "flush" with it, and having no "footing" to the west of it. This wall was run up one story, temporarily stopped, and subsequently completed. The plaintiffs have utilized the ten feet received by them on the east of the Montgomery lot.

In 1881, the Trustees of the Masonic Hall tore down their eastern wall for rebuilding. When left to stand alone, the Montgomery wall "bulged" to such an extent that the fire wardens of the city required it to be taken down as unsafe. The trustees, in taking down their wall. dug "flush" with the Montgomery wall, but no dirt fell from that side. The evidence for the defense showed that the defendants never went lower than the Montgomery wall except in two places, in order to make their foundation level; that there were inherent defects in the plaintiffs' wall, and that its foundation never sunk. **Plaintiffs** claimed that defendants had dug below their wall, and that the injury resulted therefrom. One of the plaintiffs saw that work was being done on the Masonic Hall, and cautioned the contractor to be careful as he approached the foundation of the two buildings.

In tearing down defendants' wall, the evidence for the defense showed that the contractor discovered that the Montgomery wall leaned upon it and began to "bulge" on the removal of the support, before reaching the foun-

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dation. He proceeded, however, with the work until he had gone two or three feet below the surface of the ground. when he suspended work for a day or two, and then proceeded. under instructions from the architect. During the taking down of defendants' wall, a hole was discovered in the Montgomery wall, and W.W. Montgomery, one of plaintiffs, contracted to have it filled. After the taking down of the wall below the surface of the ground. Montgomery was told by a Mason that he should look after his wall. He was on his way to the depot to leave the city, but drove to the place, was told by the contractor that he did not think there was danger, and left. He was recalled in a day or two by a notice of danger from one of his tenants and another one of the plaintiffs. No notice was given to plaintiffs of the intended improvements.

There was some other testimony not necessary to detail.

The jury found for the defendants. Plaintiffs excepted, and assigned the following among other errors:

- (1.) Because the court charged to the effect that if plaintiffs received the ten feet on the east of their lot in exchange for the ten feet held by the trustees, held it and exercised ownership over it, and still do so, they would be estopped from denying the title of defendants.
- (2.) Because the court charged that defendants "had a right to remove their wall, in the event they proceeded about it in a careful manner. All persons have a right to use their own property in any manner they see proper, provided they use it in such manner as not to unlawfully damage the property of others."
- (3.) Because the court charged, in effect, that as to property coming from a common grantor, there was a right to lateral support of the soil, and also of such structures as might at the time have been on the soil; but that if no injury resulted from the removal of lateral support, but from other causes, such as inherent defects in the building, there could be no recovery.
  - (4.) Because the court charged that plaintiffs "had no

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right to have their wall rest above the ground on the wall of defendants;" but the latter would be bound in removing their wall to use due care not to damage their neighbors, if they could prevent it without extraordinary expense.

- (5.) Because the court admitted the books of minutes of defendants, plaintiffs objecting that they could not bind others than members of the corporation. W. T. Gould was also admitted as a witness to prove the correctness of the statements on the minutes as to the exchange of lots, over objection because General Montgomery was dead, and Gould was an agent of the corporation.
- (6.) Because the court refused to charge to the effect that defendants were bound to give reasonable notice of their intended improvements to plaintiff, but charged as follows: "The court does not charge you that it was necessary for the defendants, in constructing their wall, to give notice. If they failed to give notice, that is one circumstance from which you must determine whether negligence is imputable to them in removing their wall. If you find that the defendants did not use ordinary care and diligence, taking into consideration whether or not the plaintiffs did have notice by their own personal observation, or otherwise, of the work going on or intended to be done: taking into consideration all circumstances to determine the diligence and care which characterized the conduct of the defendants: taking into consideration all the circumstances: if you find that there was diligence—ordinary diligence. ordinary skill-exhibited on the part of the defendants, you would then find for the defendants in this case."
- J. S. Hook; Barnes & Cumming; W. W. Montgomery, for Montgomery et al.
  - F. H. MILLER; J. S. & W. T. DAVIDSON, contra.

JACKSON, Chief Justice.

The Montgomerys, as tenants in common of certain tenements on Broad street in the city of Augusta, brought Montgomery et al vs. The Trustees of Masonic Hall, and vice versa,

suit against the Masonic Lodge, of that city, to recover damages for the unlawful pulling down of a wall adjoining a wall belonging to a building of the Montgomerys, by which the latter were forced to take down their own. The jury found for the defendants, and, without making a motion for a new trial, the plaintiffs excepted to certain rulings of the court on the trial before the jury.

1. One of the points made by the plaintiffs in error is, that the Masons had no title to the lot on which the wall which they pulled down rested, and were mere trespassers, and are, therefore, liable to respond in damages to the plaintiffs, having no right, whatever, to touch either wall at all, much less to tear one down to the damage of the plaintiffs. So that the first question is, in whom, under the facts, is the title to the Masonic lot and the building thereon?

The court below ruled to the effect that, under the facts, the Montgomerys were estopped from denying the title of the defendants to this lot, and exception is taken to that ruling.

In our view of the law of the case, it is wholly immaterial whether that ruling be right or wrong. The Masons held perfect title against the world by prescription. From 1828 up to this moment, they have been in the quiet, peaceable, undisturbed and adverse possession of the tenement. This gives title by prescription, without regard to any written color of title whatever. 64 Ga. R., 370.

The Montgomerys had no estate in remainder, vested or contingent. They hold under their mother's will. Therefore, if she had no title against this long possession, they had none. If the Masons' possession was adverse to her, it was adverse to them. Or, if adverse to her trustees, who held the legal title, it was to them. By the antenuptial and post-nuptial agreements between the father and mother of the plaintiffs, the mother's right to devise the property to whomsoever she chose at her death is clearly given. If she died intestate, then it was to go in

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a certain way; but if she died testate, her husband sur viving, then it was to go as she directed by will, subject, in that case, to certain reservations in his behalf. If she survived him, then her right to dispose of it by her will is without limitation or restriction. She did survive him, he having died in 1843 and she in 1880.

It is true that the learned counsel for the plaintiffs argued for a different construction of the marriage settlements, insisting that she was to devise the property by will only in a certain channel, and precisely as it would have gone by the settlements without a will: in other words, that the settlements gave her only a power to convey by will, exactly as they previously dictated. We cannot see it in that as the legal view. All her power to act by will and to have her way and will, in regard to her property at her death, is mere surplusage, and wholly without volition on her part, if she must will it in a certain way, as was already prescribed in the settlement. It was her property. Before her marriage, her intended husband relinquished his marital rights, and agreed to convey the property, after marriage, in trust for her, with certain limitations, but with her right, she surviving him, to do as she chose with it by will. If he survived her, then her will was not to go into effect as to one-half until his death. The language used in the ante-nuptial settlement is, that the trustees are to "convey and dispose of the said lots or parcels of land as the said Janet S. Blair may by her will appoint; the conveyance and disposition shall take effect as to a moiety or one-half of said lots or parcels of land immediately after the death of the said Janet S. Blair, and as to the other moiety or one-half, immediately after the death of the said Wm. W. Montgomery." This is the provision in case the husband survive the wife. But if she survive, the trustees are to hold the entire property "for the use of the said Janet S. Blair during her life-time, not to be disposed of, aliened or conveyed by her, by marriage, deed, or in any other way than by will, and for the

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use, maintenance and education of her issue and their descendants, in such manner as the said Janet S. Blair may direct."

We do not think that these last words, in respect to the use of the descendants, limit the scope of her will-power, construed in connection with the paragraph in regard to her will, if the husband survived her. In that case, no restriction is put upon her will, except that one-half of the property is to remain to the use of the husband for life. It would be strange if, in the latter event, she surviving him, she should have less power. The meaning of the words in respect to issue and descendants, is that the trustees are to hold the property for her use and for the use of her children and descendants during her life, as she may direct in her life-time. The word "education" is potent to show that this is the meaning.

The post-nuptial deed could not alter the ante-nuptial agreement, but it really follows substantially the antenuptial in respect to the provision where the husband survives, and where the wife survives also, containing, however, these additional words: "And the said Wm. W Montgomery authorizes and empowers the said Mrs. Janet S. Montgomery, late Miss Janet S. Blair, to make a last will and testament in pursuance of the provisions of this settlement and of the precedent covenant."

The object of this limitation, as we think, was to guard the interest of the husband in the event he survived the wife, and to debar her from the right to make a will other than is in accordance with that covenant; and this clause does not, and could not, alter the legal effect of the antenuptial agreement and its provisions repeated in the postnuptial settlement.

Such was the construction put on the settlements by Mrs. Montgomery, who disposed of it by will, without regard to any remainder estate in anybody. Such was the construction put upon it by the plaintiffs in this action, two of whom executed the will and assented to the legacies, and all of whom took and claimed under it. Montgomery et al. vs. The Trustees of Masonic Hall, and vice versa.

Meaning must be given to her power to dispose of the property at her death by will. If the *corpus* is already disposed of by the settlements, and is to go to the children in the exact manner they direct, there will remain no disposition of the property, as she wills it to go at the time she makes a will, in contemplation of her death.

The entire scheme of the settlements is that the wife. whose was the whole property prior to marriage, should have an annual support of six hundred dollars of the income in preference to every claim, except repairs: then the balance of the income is to be enjoyed by her husband and herself during their lives; then, if she died before him, he was to enjoy half the income until his death, she to dispose of the whole corpus by will, but that will not to affect the moiety to his use until his death; but if she survived (as she did), then she was free to dispose of it all as she chose. There is no direction that she shall will it to the children at all, neither as tenants in common, nor in any other manner. She cannot dispose of the corpus in any manner at all, except by will; but for the use, maintenance and education of the children, under her direction alone, the trustees could have disposed of the usufruct, and in cases of emergency, perhaps, of the corpus. The precise language of the post-nuptial deed, in respect to the contingency of her surviving her husband, which did occur, is that the trustees "shall hold the said lots or parcels of land for the use of the said Mrs. Janet S. Montgomery. late Miss Janet S. Blair, during her life-time, not to be disposed of, or aliened or conveyed by her, by marriage, or deed, or in any other way but by will, and for the use, maintenance and education of her issue and their descendants, in such manner as the said Mrs. Janet S. Montgomerv. late Miss Janet S. Blair, may and shall direct." The property is to be held by them for her use and the use, maintenance and education of the children during her life as she may direct, with the right in her to give it by will as she chose after her death. The words, "and for Montgomery et al vs. The Trustees of Masonic Hall, and vice versa.

the use, maintenance and education of her issue," etc., must follow and be construed with the prior words, "for the use of the said Mrs. Janet S. Montgomery," etc., "during her life-time." The words respecting the issue, as well as herself, apply to the trustees holding the estate for her life-time, at the termination of which the trust was also executed, the husband being dead and the will made. And, as remarked before, the word "education" shows that this is the true meaning. If it be replied that "descendants" is too extensive a word to be limited to a life, it may be answered, that unless limited, it is illimitable here, and the other construction might make the equitable estate descend forever to the issue and descendants of issue of Mrs. Montgomery, and put the equitable fee in her.

The clause following empowers Mrs. Montgomery "to make a last will and testament in pursuance of the provisions of this settlement and of the precedent covenant." which means, as we think, the covenant that the will is not so to operate, if the husband should survive as to dispose of his usufruct of one half the estate during life. No estate in remainder is put in the issue by this settlement; and we are clear that the construction put upon it by Mrs. Montgomery and her children, including the very able counsel who represents them all here, is correct and should stand. We conclude, then, without invoking the doctrine of estoppel, which would unquestionably apply, if as the admitted evidence shows, the Montgomerys got another lot of equal size from the Masons in 1828, and have built upon and occupied it ever since, that the title by prescription to the Masonic lot is perfect in the Masons without regard to any deed at all from General Montgomery: and hence that the court was right in so far as it charged the jury that the plaintiffs could not recover on the counts which set up title in themselves to the Masonic lot.

2. This strips the case of any conflict of title to the corpus of the property. The plaintiffs insist, however, that inasmuch as both parties did derive title from General Mont-

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gomery, a common grantor, therefore they acquired an easement to the support of their wall by the adjoining soil of the Mason building. That depends on the question whether they did hold under a common grantor? We have seen that the Masonic lodge holds by prescription—adverse possession for fifty odd years—which presumes a grant to them from the state. They hold, then, by grant from the state, and the Montgomerys under the will of their mother—totally distinct titles and different grantors.

The law is that the owners of adjoining land owe to each other, as incident to their juxtaposition, the lateral support of the soil of each to that of the other, in its natural state, whether they derive title from a common grantor or If they derive title from a common grantor, then that lateral support extends further than that of the soil in its natural condition, and embraces the superincumbent weight that may be upon it by fence, wall or other burden. at the time the common grantor parts with title, there be buildings adjoining each other, then the right extends to the lateral support which each adjacent wall gives to the If there be between the two proprietors a party wall—that is, a common wall between them, supporting the timbers of each—then the right of each to that wall for the support it gives his building is that of a tenant in common with the other, and neither can touch it so as to displace the other's timbers therein supported, or in anywise injure or make them insecure.

The above summary of the law will be found fully supported by Washburn on Easements and Servitudes and numerous cases there cited in chapter IV, sections 1, 2 and 3.

There is no pretence of any party wall here in the case at bar; none, that if there had been a common grantor, buildings had been erected when he parted with title; but the pressure urged by counsel is, that there was a common grantor; that both parties hold under General Montgomery, and that the plaintiffs are entitled to the lateral support of the soil of the Masonic lot, not only for the soil of their lot

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as it was when the Masons bought, but with the superincumbent weight put on it afterwards. So that the point whether or not there was a common grantor, is vital.

In no conceivable view of the testimony disclosed in the record do the parties hold under a common grantor. The one holds by prescription—grant from the state; the other from Mrs. Montgomery under her will.

It is replied, however, that it is recited in a deed drawn by notice from defendant, that it holds under General Montgomery, and that the presumption of grant from the state is thereby rebutted, and thus each party holds under him. But the facts also show that General Montgomery had no title to convey to the Masons, and thus granted them nothing. So far as he had any title, he had granted it away to trustees for his wife, and he had none left to grant to the defendants. But he never had any for a moment, except subject to an ante-nuptial agreement, which bound him to make a deed pursuant to that agreement, and which agreement utterly annihilated his marital rights and prohibited him from asserting title. That agreement could have been enforced at any time by Mrs. Montgomery, and was itself evidence of her title free from his marital rights.

So that the deed by Montgomery, if there was one, was mere color to support prescription, and the prescriptive title is the title of the Masons.

And even if the trustees had made the title to the Masons, the marriage settlement gave them no such power, and their deed would have been mere color to support prescriptive title. Therefore, in any view of the case, the title of the Masons rests in prescription, and that of the plaintiffs by purchase under their mother's will; and there is no common grantor in the case.

3. The question of fact, whether or not the wall was taken down carefully or negligently so as to disturb the soil on which the Montgomerys' wall rested, was settled by the jury; there is no motion for a new trial on the ground that the verdict is decidedly against evidence; if there was, we

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would not disturb the verdict, as, to say the least, it is supported by evidence.

- 4. It is thus apparent from the views presented above, that it is wholly immaterial whether Judge Gould's testimony was admitted or rejected, or whether the minutes of the Masonic lodge were properly in evidence or not. The admission of either neither helped nor hurt either party.
- 5. The court declined to charge that failure to give notice entitled plaintiffs to recover without more; but charged that "if they failed to give notice, that is one circumstance from which you must determine whether negligence is imputable to them or not." And again, "If you find that the lefendants did not use ordinary care and diligence, taking into consideration whether or not the plaintiffs did have notice by their own personal observation, or otherwise, of the work going on or intended to be done; taking into consideration all circumstances to determine the diligence and care which characterized the conduct of the defendants; taking into consideration all the circumstances, if you find there was diligence—ordinary diligence, ordinary skill—exhibited by defendants, you would then find for the defendants."

We do not see material error in this view of the law applicable to this case. Circumstances developed by the testimony point to substantial notice or knowledge of what was going on and the condition of things, while formal notice may not have been given. The object of the notice is, that the party may have knowledge of what is going on, of the fact that the wall is being pulled down. The plaintiffs had that knowledge, and that is notice.

In the view we have taken of this case, after much deliberation, we see no such substantial error as demands a new trial in order to further the ends of justice. On the contrary, the law of the case seems to us plainly against the plaintiffs, and they have taken no issue with the jury on the facts.

There is no party wall in it; there is no doctrine of the

law in the case of the rights of proprietors of adjoining lots where a common grantor deeds tenements standing or lands adjoining each other applicable to the facts of this case. So that the case of Henry vs. Rock, decided by the Kentucky court of appeals, October 3, 1882, and cited by plaintiffs in error, has no application. The ruling there is: "Purchasers of adjoining houses from a common owner are presumed to contract with reference to the condition of the property at the time of the sale, and when the house of one purchaser is supported by a wall on the lot of the other, the right of the former to the use of the wall for the support of his house is an easement, with the enjoyment of which the owner of the lot on which the wall stands has no right to interfere by tearing away the wall or so altering it as to injure his neighbor's house." This is good sense and seems sound law, but wholly inapplicable where there is no common owner and no houses sold. And so equally · inapplicable is all the law touching the rights of purchasers from a common owner or grantor; for the reason that in our view of the facts there is no common owner or grantor on whose title both parties stand in this case.

Judgment affirmed.

# Davis, receiver, vs. Tift.

1. W. applied to T. for a loan of money. The latter was willing to oblige him, but being unable to control his funds immediately, said that if W. could get the money elsewhere, he would refund it in a few days. W. applied to a firm, made known to them these facts, and obtained the amount, which was charged on the books to T., to whom they looked for reimbursement. W. left, and in a few days the firm applied to T. for the money, and the latter responded in writing that he had told W. that he could not get the amount before the fourth of December following, or perhaps some days later:

Held, that if the loan was made to T., and W. was not held liable for it by the lending firm, and there was enough in T's conduct to authorize this conclusion upon the part of the firm, then T's was an original undertaking, and not an agreement to answer for the debt,

default or miscarriage of another.

- 2. A promise in writing to answer for the debt of another need not state the considerations therefor, but the fact of the undertaking being in writing does not preclude inquiry as to whether a consideration for the promise in fact exists; and a promise to pay the pre-existing debt of another, without any detriment or inconvenience to the creditor, or any benefit secured to the debtor in consequence of the undertaking, is a mere nudum pactum.
- (a.) If the promise of T. to see the money paid was given before the loan was made, and furnished the inducement to the firm to part with their money, and they performed their part of the contract made with T., directly or through his agent, then he would be bound, irrespective of any acknowledgment in writing.

March 20, 1883.

Debtor and Creditor. Contracts. Statute of Frauds. Before Henry Morgan, Esq., Judge pro hac vice. Dougherry Superior Court. October Term, 1882.

Reported in the decision.

G. J. WRIGHT; D. H. POPE, for plaintiff in error.

JONES & WALTERS, for defendant.

HALL, Justice.

Wight applied to his brother-in-law, C. W. Tift, for the loan of a thousand dollars to aid a firm in Chicago, of which he and Welch & Bacon, merchants of Albany, Ga., together with Scolly, were members. Tift was willing to oblige him, but being unable to control his funds immediately (they being on deposit with N. & A. F. Tift & Co.), said to him, if he could get the money elsewhere, he would refund it in a few days. Wight applied to Welch & Bacon, made known to them these facts, and they advanced the amount charging it on their books to C. W. Tift, and looking to him to reimburse them. As soon as Wight received the money, he left for Chicago. In a few days thereafter, Welch & Bacon applied by written note to C. W. Tift for the money, who replied in writing that he told Wight, before he left, that he could not get the

amount before the 4th of December, and, perhaps, not until some days later, to which he said: "All right; let us have it as soon as you can," "which," Tift added, "I will do." Welch & Bacon failed, and their effects went into the hands of John A. Davis, as their receiver, who brought this suit.

Among others, the defendant filed pleas that ne never authorized Welch & Bacon to advance Wight this or any other amount of money; that he never received said sum or any part thereof; that it was not advanced for his benefit, nor at his solicitation, nor did he know the advance was, or was intended to be, made and charged to him, until after it was done, nor did he ever promise to pay it to Welch & Bacon. or any one else; that, if any such advance was made, it was so done for the individual benefit of Wight, and that defendant never promised or agreed in writing to answer for the default or miscarriage of Wight; that shortly after the advance was made to Wight, Bacon, one of the firm of Welch & Bacon, wrote defendant a note, asking for the payment of said sum of money, stating that Wight had told his firm that defendant would pay the same on a cer. tain day; to which defendant replied in writing, that he did not authorize the advance, and did not consider himself bound for it, but that he had promised Wight, not Welch & Bacon, that he would relieve him by paying it for him when he could do so; that this is defendant's recollection of the matter as it occurred.

The evidence in the case is substantially as stated above.

Henry Morgan, Esq., who tried this case as judge pro hac vice, charged the jury: "If they believed from the evidence that the defendant did not agree with Welch & Bacon to get the money and let Wight have it, and agree with them that he would pay it back, and only negotiated and agreed with Wight about the money, then there was no privity between Tift and Welch & Bacon, and the plaintiff could not recover, especially if Tift only intended to

accommodate Wight with the loan"; and he refused to charge, as requested in writing by plaintiff's counsel, "that if Tift authorized Wight to get from Welch & Bacon, or any one else, the money, and he got it from Welch & Bacon, informing them that Tift would pay it, that would be a sufficient consideration to support a written promise by Tift." He also refused to charge, as requested in writing by plaintiff's counsel, "that if they should believe from the evidence that Tift, the defendant, authorized Wight to get the money from Welch & Bacon, or any one else, and Wight got it from Welch & Bacon, and Tift afterwards, in writing, promised to pay the same, then he is liable," but added thereto, as a qualification, the words, "for a consideration."

1. This charge of the court does not fully present the case in its various aspects to the jury, and restricts them to only one of its several phases. If the loan was made to Tift, and Wight was not held liable for it by Welch & Bacon, and there was enough in Tift's conduct to authorize this conclusion upon the part of Welch & Bacon, then Tife's was an original undertaking, and not an agreement to answer for the debt, default or miscarriage of another person. Were Welch & Bacon authorized to look to Tift alone for the payment of this money, or did they look to Wight also? If the former is true, Tift was bound; but if the latter was the case, then he was not bound. This is the test laid down by Lord Holt in the leading case of Birkmyr vs. Darnell, Salk., 27; 1 Smith's Lead. Cases, (4th Am. ed.), p. 316. "The question," says Sergeant Williams in his note to Forth vs. Stanton, 1 Wm. Sanders, 211, "is, what is the promise? Is it a promise to answer for the debt, default or miscarriage of another, for which that other remains liable? Not what the consideration for that promise is; for it is plain that the nature of the consideratica cannot affect the terms of the promise itself, unless, as in the case of Goodman vs. Chase, 1 B. and A., 297, it be an extinguishment of the liability of the original

party." Butcher vs. Stewart, 11 M. & W., 857. Notes to Birkmyr vs. Darnell, 1 Smith's Lead. Cases, 317.

2. A promise in writing to answer for the debt, etc., of another, need not, under our law, as in England, state the consideration for the promise. Black vs. McBain, 32 Ga., 128. But the fact of the undertaking being in writing does not preclude inquiry as to whether a consideration for the promise in fact exists, as in the case of a promise to pay the pre-existing debt of another, without any detriment or inconvenience to the creditor, or any benefit secured to the debtor in consequence of the undertaking. Parker vs. Carter, 4 Munf. (Va.), 273; Chandler, 2 Hen. & M. (Va.), 273. Such a promise, according to all the authorities, is mere nudum pactum. 1 Addison on Con., §1; sub-sec. 3, p. 9.

If, therefore, Tift's undertaking was to pay a loan made to Wight, after it was made, and without any new consideration, it was a nude pact, and not binding, although in writing; but if his promise to see it paid, before it was made, was the inducement to Welch & Bacon to part with their money, and they performed their part of the contract made directly with Tift, or through his agent, then he is bound, irrespective of any acknowledgment in writing. Code, 1951, par. 2; Saulsbury, Respess & Co. vs. Blandys, 60 Ga., 646.

Inasmuch as these questions were not fully submitted to the jury, this charge is not full and complete, and to the extent that it fails to call attention to these issues, is erroneous.

As the case goes back for another hearing, we refrain from expressing any opinion upon the other grounds of the motion for a new trial.

Judgment reversed.

# THE CAPITAL BANK OF MACON et al. vs. RUTHERFORD.

1. Where facts are charged to be within the knowledge of the defendant, or where, from all the circumstances, such knowledge is necessarily presumed, and he either fails to answer altogether or makes an evasive answer, the charge will be taken as true.

2. Equity will set aside the judgment of a court having jurisdiction only where the party had a good defense, of which he was entirely ignorant, or where he was prevented from making it by fraud or accident, or the act of the adverse party, unmixed with fraud or negligence on his part. But if such causes be shown, equity will annul a conveyance obtained by fraud, or will relieve against a judgment obtained by imposition.

(a.) Suppression of a fact material to be known, and which the party is under an obligation to communicate, from the existence of confidential relations, or from the particular circumstances of the case, constitutes fraud.

3. A wife cannot bind her separate estate by any contract of suretyship, nor by any assumption of the debts of her husband, and sales made by her in extinguishment of her husband's debts are abso-· lutely void.

(a.) There is enough in this case to require an investigation before a court and jury, and the grant of an injunction was proper.

April 3, 1838.

Equity. Husband and Wife. Fraud. Judgments. Injunction. Before Judge Fort. Crawford County. At February 23, 1883. Chambers.

Reported in the decision.

BILLUPS & HARDEMAN, for plaintiffs in error.

R. D. SMITH; HARRISON & PEEPLES, for defendant.

HALL, Justice.

Was the grant of an injunction in this case, staying proceedings upon a judgment obtained by the plaintiffs in error, against the defendant in error and her husband, in an action of ejectment, in order to enable her to open the judgment and set up a defence thereto, which she alleges came to her

knowledge after the judgment was entered, and which she was prevented from discovering earlier, by no negligence on her part, but by the fraudulent conduct of the plaintiff and its confederates, an abuse of the chancellor's discretion?

The record makes this case: Upon a petition filed by complainant's trustee, he was authorized by an order of the chancellor to borrow a sum of money, not exceeding twelve hundred dollars, for the use of the trust estate, and in order to secure the loan, he was allowed to pledge or mortgage the lands belonging to the trust estate. This order was made upon a regular petition served upon all the parties The complainant consented to the arrangein interest. ment, as did her minor children, by their guardian ad litem: the defendant in the bill made a loan and took the trustee's notes and a conveyance under the act of 1871. Code. \$1969. of a part of the lands belonging to said trust estate, and at the same time complainant's conveyance to said lands, in accordance with the chancellor's order, to secure the loan The amount of money thus loaned was not paid when it fell due, and the defendants instituted their action of ejectment against the complainant and her husband for the recovery of the land thus conveyed to it. Although personally served, it does not appear that she answered the suit, or authorized any one to do so for her; neither did her trustee respond to the suit; her husband appeared at the trial term of the case, and by an agreement with him and his counsel, a verdict was rendered by consent, with a stay of execution.

It seems that the money was paid by the defendant to the complainant's husband, who was constituted by the trustee his agent to receive and expend the same; that after the order for the loan secured by the lien was obtained, the entire negotiation was conducted by this agent, and that the trustee received no part of the money, and concerned himself not at all about the particulars of the transaction, or the disposition of the amount advanced.

The bill charges, among other things, that complainant's

husband owed the defendant, in the year 1874 or 1875, three hundred dollars, for which defendant held his individual notes; and failing to pay the same, he thereafter went into bankruptcy; that after going into bankruptcy, he applied to the defendant for another loan, which was refused. unless he would secure what he already owed it, and to that end would obtain deeds from her and her trustee to her trust lands, which her said husband agreed to do; that the defendant then advanced him the further sum of six hundred dollars, at usurious rates of interest, and they "fixed up" the notes in question, for the past indebtedness, the further loan of six hundred dollars and the usurious interests amounting to one thousand and eighty-five dollars. and her said husband, acting as the agent of defendant, by false representations, to the effect that the full amount of money was borrowed for the use of complainant and her children, induced her to consent to the making of the notes and the deeds to secure their payment; that she received none of the money borrowed, but the same was appropriated by her husband, and that all these facts were well known to the defendant; that neither her trustee nor her children were parties to the suit brought by the defendant for the recovery of the trust lands embraced in the deeds, and not being parties were not served with the writ and did not appear and answer to the same; that at the March term, 1880, of Crawford superior court, her said husband combining and confederating with his co-defendant in the bill, the said Capital Bank, allowed a verdict and judgment to be taken in its favor for said land; that this was done without her knowledge or consent; that this fact has recently come to her knowledge, and that she was not aware that there was included in the notes and deeds any usury, or the prior or any other debt of her husband during the pendency of the said action of ejectment, or before that time, or when said verdict was agreed on and judgment entered thereon, and that as soon as she discovered these things, she applied to her trustee and demanded that he

should take steps to assert her rights in the matter, and have said judgment set aside, but he refused, giving as a reason for his refusal that it might injure his credit and business relations with the defendant's bank.

Upon the presentation of this bill, the judge issued a rule calling upon the defendants, on a day named therein, to show cause why the injunction prayed for should not be granted, and ordering a stay of proceedings until the hearing. At the hearing the complainant produced and read the affidavit of Williams Rutherford, her husband, in which he deposed, among other things, that he made the arrangement himself with the Capital Bank of Macon by which they advanced certain money to him on the trust property of his wife and children; that after the terms had been agreed upon, he went to A. W. Gibson (the trustee) and complainant and induced them to sign the notes and deeds; all the money was paid to him. Before the bank would agree to advance any money, it required that the sum of two hundred and seventy-eight dollars, besides several years' interest, which he owed it individually, before he went into bankruptcy, should be embraced in the notes and deeds given by his wife and her trustee to secure the payment of the same; that he received from the bank only six hundred dollars, and the balance of the amount ineluded in the deeds and notes was the principal and interest of the old claim that the bank held against him prior to his going into bankruptcy, and which the said bank demanded, should be included in said notes and deeds before they would advance the six hundred dollars; that all of said six hundred dollars has been paid to the bank, except fifteen dollars; that his said wife had no hand or part in, or knowledge of, the arrangement made by him with the attornevs of the bank by which a verdict and judgment in the ejectment suit was taken, nor did she know of the same until recently; neither did she, so far as he knows or believes, have any knowledge of the fact that any individual debt of his was included in said notes and deeds until very recently.

The bank in its answer admits that the verdict and judgment in the ejectment case were the result of an agreement between its counsel and Williams Rutherford and his counsel. It pointedly denies that there is any usury in the transaction, or that said Rutherford was its agent, but asserts that he was the agent of complainant and her trustee; denies responsibility for his alleged infidelity; sets forth the order of the chancellor authorizing the loan and the security for the same, together with the notes and deeds given by Gibson and Mrs. Rutherford in pursuance of the chancellor's order, and pleads that she is estopped by the deeds and notes, as well as by the verdict in the action of ejectment. All these papers they put in evidence, together with an affidavit of A. W. Gibson to the effect following: That as trustee he executed the notes and deed in pursuance of the chancellor's order; that the loan was made for the purposes set forth in his petition on which this order was made; that he believed then and believes now that the statements contained in the petition were true: that he did not in person apply the funds as the order directed. They were paid to Williams Rutherford, who acted as his agent, by whom he believes the funds were used for the benefit of the trust estate.

1. It is a significant fact that the answer of the bank, while full and direct upon almost every other point, should be entirely silent upon the very gravamen of the complainant's bill, viz.: that the old debt of Williams Rutherford was insisted upon by it as a condition of this loan to the trustee, and the studious concealment of this fact from the wife and her trustee, who might be well deluded into the belief from the petition to encumber her property—which petition was sworn to, not only by the trustee, but by the guardian ad litem of the minor children and by the husband—that the whole amount for which the notes and securities were given, was an advance for the benefit of the trust estate. The securities executed by the trustee and the complainant recited upon their face the pur-

pose set forth in the petition and the chancellor's order thereon for which the loan was made. Nothing is better settled than that where facts are charged to be within the knowledge of a party, or where from all the circumstances such knowledge is necessarily presumed, and he either fails to answer altogether or makes an evasive answer, the charge is to be taken as true. Neale et al. vs. Hagthrop, 3 Bland, 551; Philips vs. Coons, 4 Bibb, 247; Lewis vs. Stafford, Ib. 319.

2. Now, do the bill, answer and proofs make a case for relief, or rather, do they sustain the chancellor's order for an injunction?

Equity will interfere to set aside a judgment of a court having jurisdiction, only where the party had a good defence of which he was entirely ignorant, or where he was prevented from making it by fraud or accident, or the act of the adverse party, unmixed with fraud or negligence on his part. Code, §3129.

Fraud will authorize a court of equity to annul conveyances, however solemnly executed, and to relieve against awards, judgment and decrees obtained by imposition. Code, §3178.

The judgment of a court of competent jurisdiction may be set aside by a decree in chancery for fraud, accident or mistake, or the acts of the adverse party unmixed with the negligence or fault of the complainant. Code, §3595, and the numerous cases cited under each of these sections from the reports of this court, in the Code of 1882.

The denial that Williams Rutherford was the agent of the Capital Bank in this transaction amounts to little, when it is evident from the charge in the bill that there is a misuse of the word; it was evidently used in the sense of his being in complicity with the bank. Suppression of a fact material to be known, and which the party is under an obligation to communicate, constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties, or from the particular circum-

stances of the case. Code, §3175. Any relations shall be deemed confidential arising from nature or enacted by law, or resulting from contracts, where one party is so situated as to exercise a controlling influence over the will, conduct, and interests of another; or where, from similar relations of mutual confidence, the law requires the utmost good faith, such as partners, principal and agent, etc. Code, §3177.

3. Had the complainant a good defence, by which she might have defeated the recovery in the action of ejectment, in whole or in part, which she failed to set up, because she was entirely ignorant of it, or was prevented from making it by the fraud or act of her adversary? That a wife cannot bind her separate estate by any contract of suretyship, nor by any assumption of the debts of her husband, is expressly declared by the law of this state, and all sales made in extinguishment of her husband's debts are absolutely void. Code, §1783, and cases there cited. So far does the law extend its protection of her rights, that it will not regard a sale of her separate estate to her husband as valid, unless the same is allowed by an order of the superior court of the county of her domicile. then, enough in these proceedings to require an investigation of this case before a court and jury, in order that they may determine whether this complainant had a good defence to the action of ejectment; how much of her husband's debt entered into these notes and conveyances; how much is still due of the 600 dollars advanced under the order of the chancellor, and whether she was prevented from setting up this defence by any of the causes above enumerated; and how far she was negligent, if she was so at all, in failing to insist at the proper time upon her rights. From this it follows that we are of opinion that the order directing the injunction to issue was proper.

Judgment affirmed.

# Schley, executor, et al. ve. Brown.

# Schley, executor, et al. vs. Brown.

- Where the same person was both executor and testamentary trusteeunder a will, but the title to certain property therein devised was placed in him as trustee, in a suit to recover realty so left, a demise in the name of the executor was not available.
- (a.) The will in this case construed.
- 2. Where property was held in trust for testator's daughter during her life, the trustees being required to leave her in possession and permit her to enjoy the entire rents, issues and profits for her own use and support, and after her death to apply the entire income to the support of her children named in the will, or such of them as might survive her, so long as each of them lived, with contingent remainder to the children of the grandchildren of testator, until the interest of the successive cestuis que vie were fully satisfied, the contingency had not happened upon which the title could pass to these children of grandchildren, and no recovery could be had on a demise in their names.
- The sale of such trust property with the consent of testator's daughter and her children, and under order of the chancellor, vested a perfect title in the purchaser.
- (a.) The purchaser, having bought bona fide and for a valuable consideration, will be protected, although subsequent events may disclose that the sale and re-investment were mistakes of judgment. Courts of law and equity have gone far to protect such purchasers, even when they held under doubtful or irregular sales, or defective or incorrect judgments of courts having jurisdiction of the subjectmatter.
- 4. It was not necessary for such of the contingent remaindermen (children of testator's grandchildren) as were in life at the time, to have been made parties to the proceeding to obtain a judgment allowing the sale, nor is the sale rendered invalid because this was not done. In such cases, not only the holder of the first estate should be before the court, but also the intermediate remaindermen for life should be parties. But when the person who is to take the remainder is not ascertained and the remainder is contingent, it is sufficient to have before the court the trustees to support the contingent remainder, and the persons in esse having title to the vested estates.
- (a.) This case is distinguished from the case of the City Council of Augusta vs. Radcliffe, 66 Ga., 469. In that case a power of sale was given upon certain terms, which were not complied with, and the title did not pass.

April 8, 1888.

Schley, executor, d al. vs. Brown.

Wills. Estates. Trusts. Title. Administrators and Executors. Remainders. Before Judge Willis. Muscogee Superior Court. May Term, 1882.

Reported in the decision.

BLANDFORD & GARRARD, for plaintiffs in error.

R. J. Moses; Peabody & Brannon, for defendant.

HALL, Justice.

This suit was brought upon the several demises of William Schley, executor of the last will and testament of Governor William Schley; also of William Schley, as trustee under and by virtue of the provisions of said will; and lastly upon the demise of Matilda Louisa Brown, Amelia C. Brown, Sarah D. Brown, Robert E. Brown, Marie S. Brown, and Elizabeth Brown, John D. Smith, Richard P. Smith and Margaret Corbin, against J. Rhodes Brown, as tenant in possession of certain lots in the city of Columbus. The defendant appeared and pleaded the general issue, and under that plea set up, with his other defences, title by prescription to the premises in dispute. Both parties claimed under the will of Governor Schley, which was executed on the third day of April, 1858, proved in chambers on the 24th day of November, 1858, and admitted to record at the December term, 1858, of the court of ordinary of Richmond county. The case was tried by consent, nnon an agreed statement of facts, by the judge without the intervention of a jury, and after hearing the evidence thus agreed upon, the court gave judgment in favor of the defendant; and the plaintiffs, alleging error in that judgment, excepted thereto, and brought the case by writ of error to this court.

The following facts were agreed upon, viz.: That the premises in dispute were the property of Governor William Schley at the time of his death.

Schley, executor, et al. vs. Brown.

That Anna Maria Davis died on the 21st day of April, 1879. That Richard Davis died unmarried and without children before his mother, Anna Maria Davis. That Mrs. Isabella B. Smith and Mrs. Sarah N. Brown, formerly Davis, died before their mother. Anna Maria Davis. Mrs. Charlotte Ridenhour, formerly Davis, is still living.

That the lessors, Browns, mentioned in the declaration, are the children of Mrs. Sarah N. Brown, deceased, and the lessors, Smiths, and Mrs. Corbin, are the children of Mrs. Isabella B. Smith, deceased.

The plaintiffs then tendered and read in evidence a duly exemplified copy of the last will and testament of the said William Schley, which contained, among others, the following bequests, which are alone material to the questions here made.

"Thirdly-I give and bequeath unto my nephews, James H. Maxwell and William Schley, Jr., Esq., both of the county and state aforesaid, (as trustees for my daughter, Anna Maria Davis, and such of her children as are hereinafter named), whom I do nominate and constitute such, and to their heirs, executors, administrators and assigns, the following property, real and personal, to-wit: Thirteen negroes, viz., Robert, Polly, Henry, Jane, Julia, Kizzy, Mary, Tom, Flora, Frances, Bettie, Abner and America, as also the increase of the females which they may heretofore have had, or may hereafter have; also sundry household and kitchen furniture, silver and plated ware, and other articles, which said negroes, furniture, silver and plated ware, and other articles, I purchased from Mr. John Fontaine and loaned to my said daughter, a schedule of which may be seen by reference to the bill of sale made to me by Mr. Fontaine, which is of record in the clerk's office in the city of Columbus, as also the other papers in relation to the purchase and loan, and also in the receipt given to me by the said Anna Maria Davis, and her husband, Arthur B. Davis, who was then in life, for the said property as a loan from me, and which said property is now in possession of my said daughter (except a part of the furniture, sold by A. B. Davis in his life-time to Mr. John Woolfolk, which sale I hereby sanction and confirm, and except also such of the said furniture as was consumed in the great fire in Columbus in the year 1846, which destroyed her house, and except also two negroes, Flora and ----, which she sold, and which sale I do also confirm). I also give and bequeath unto the said James H. Maxwell and William Schley, Jr., Esq., trustees as aforesaid, all my houses and lots in the city of Columbus, Georgia, known as the "Old

Schley, executor, et al. rs. Brown.

Columbus Bank lots," where my said daughter resided at the time of said fire, which destroyed that part of the city, which said property was conveyed to me by the sheriff of Muscogee county, and has been rebuilt since the fire with three store-houses. The said premises include an alley on the back part of said lots and stores, and which said lots and houses are now in the possession of my said daughter, or are rented by her. I also give and bequeath unto the said James H. Maxwell and William Schley, Jr., Esq., as trustees as aforesaid, the sum of ten thousand dollars in cash, to be invested by them in safe and profitable stocks or other property and securities, which will yield a fair and good income.

To have and to hold all and singular the said property, real and personal, to them, the said James H. Maxwell and William Schley, Jr., Esq., and to their heirs, executors, administrators and assigns forever in fee simple. But upon this special trust and confidence nevertheless, that is to say, that they, the said James H. Maxwell and William Schley, Jr., Esq., and their executors, administrators and assigns, shall permit and suffer the said Anna Maria Davis to have, hold, receive and keep possession of all and singular the said estate, real and personal, and to receive, enjoy and dispose of all the rents, income, dividends and profits of the same, in such way and manner as she may think fit and proper, for and during the full term of her natural life, and no longer. Provided, nevertheless, that no part of said property shall be carried or conveyed beyond the limits of the State of Georgia, nor used or expended for the said Anna Marin Davis-the true interest (?), object and meaning of this conveyance being to secure a support for her during her life from the rents, issues, profits and income of the said property, without in anywise lessening or impairing the principal.

And from and after the death of the said Anna Maria Davis, then upon this further trust and confidence, that is to say, that they, the said James H. Maxwell and William Schley, Jr., Esq., and their heirs, executors, administrators and assigns shall have, keep and hold possession of all and singular the said property, real and personal, as trustees for Isabella B. Smith, the wife of John Smith, Sarah N. Davis, Charlotte Davis and Richard Henry Davis, my grandchildren, and being four of the children of my daughter, Anna Maria Davis, and pay over to them, share and share alike, the said income, rents, lesnes and profits which may arise or accrue from the said property, for and during the full term of their natural lives, and in the event of the death of either, or all of the said four children, then and in such case the said property, real and personal, shall be divided into equal parts or shares, and one part or share conveyed by the said trustees to the child or children (if any) of such child or children (my said four grandchildren) so having died, and entirely freed and discharged from any further trust or confidence whatever.

But if either of my said four grandchildren should depart this life without leaving behind them a child or children living at the time of the death of such grandchild, then and in such case the part or share which would fall to such grandchild, shall merge in the general property and pass to the surviving brother and sister or sisters of the said four grandchildren, as the case may be; and in the event of the death of all my said four grandchildren, without leaving behind them a child or children living at the time of such death, then it is my will that all the said property shall be divided equally, share and share alike, among the children of my son, Dr. William K. Schley, freed and discharged from any further trust or confidence whatever.

Fourthly-I give and bequeath unto my said nephews, James H. Maxwell and William Schley, Jr., Esq., and their heirs, executors. administrators and assigns (as trustees for my son, Dr. William K. Schley, and his children, now in life, and such as may be born to him hereafter), the following property, real and personal, to-wit: My undivided half part of certain lots of land, lying in the state of Mississippi, which were conveyed by John Schley, Esq., to George Schley, Esq., and myself, and which are now held by us in common, the quantity of acres being originally thirty-two hundred, some of which, however, has been sold by our agent, Mr. Craft, one-half part of what remains being mine. Also one negro woman named Emily, now in the possession of my said son, William K. Schley. The above named land I do hereby authorize and empower the said George Schley, Esq., to sell when he may be able to do so, and to pay over the net proceeds thereof to the said James H. Maxwell and William Schley, Jr., Esq., trustees as aforesaid, to be by them invested in bank or other safe and profitable stocks, or in negroes, to be under and subject to the same trust and confidence as are hereinafter mentioned and declared in regard to the other property conveved in and by this item of my will.

"I also give and bequeath to the said trustees, their heirs, executors, administrators and assigns, the sum of ten thousand dollars in cash, to be by them invested in safe and profitable stocks, or other property and securities, which will yield a good and fair income.

"To have and to hold all and singular the said property, real and personal, to them, the said James H. Maxwell and William Schley, Jr., Esq., and to their heirs, executors, administrators and assigns, forever in fee simple. But upon this special trust and confidence nevertheless, that is to say, that they, the said trustees, their heirs, executors, administrators and assigns, shall permit and suffer the said Dr William K. Schley to have, hold, and keep possession of all and singular the said estate, real and personal, and to have, hold, receive and enjoy, and dispose of all the rents, issues, dividends, profits and income of the same, in such manner and way as he may think fit and proper, for and during the full term of his natural life,

and no longer. Provided, nevertheless, that no part of the said property shall be carried or conveyed beyond the limits of the state of Georgia, nor used or expended to pay any debt or debts now due, or which may be hereafter due, contracted by the said Dr. William K. Schley; the true object and intent of this conveyance being to secure a support for him during his life-time from the rents, issues, profits, dividends and income of the said property, so far as they may go, without in any way lessening or impairing the principal.

"And from and after the death of the said William K. Schlev. then upon this further trust and confidence, that is to say, that they, the said James H. Maxwell and William Schley, Jr., Esq., and their executors, administrators and assigns shall have, hold and keep possession of all and singular the said property, real and personal, as trustees for Ann P. Schley, William Schley, Charlotte T. Schley and Sarah Schley, the children of the said Dr. William K. Schley, and for such other children as may hereafter be born to the said Dr. William K. Schley, and pay over to them, share and share alike, the said income, rents, issues and profits which may arise or accrue from the said property for and during the full term of their natural lives. And in the event of the death of either or all of the said children of the said William K. Schley, then and in that case the said property. real and personal, shall be divided into as many parts or shares as there were children in life at the time of the death of the said Dr. William K. Schley, and one part or share conveyed in fee simple, and freed and discharged from any further trust and confidence, to the child or children (if any) of such child or children of the said Dr. William K. Schley so having died. But if either of my said grandchildren, the children of my said son, William K. Schley, should depart this life without leaving behind him or her a child or children living at the time of the death of such grandchild, then and in such case the part or share which would fall to such grandchild shall merge in the general property and pass to the surviving brothers and sisters of such grandchild so dying without leaving a child or children. And in the event of the death of all the children of the said Dr. William K. Schley without leaving behind them a child or children living at the time of such deaths, then it is my will that all the said property shall be divided, share and share alike, among and between the said four children of Anna Maria Davis, to-wit: Sarah N. Davis, Ann J. B. Smith, Richard Henry Davis and Charlotte Davis, freed and discharged from any further trust or confidence whatever.

"I have heretofore, at different times, given my said son, William K. Schely, about the amount of ten thousand dollars, for a part of which I hold his notes, and which said notes I do hereby cancel and direct to be delivered up to him. But the above stated Mississippi lands were paid for by him, so that the actual amount he received did not exceed eight thousand dollars. I have heretofore given to my said son, Wm. K.

Schley, a negro boy named Cornelius, which boy he has sold, and which sale I do hereby ratify and confirm. The said boy, as also the said woman, Emily, above named, were mortgaged by the said William K. Schley, to Philip Schley, Esq., which said mortgage has been assigned to me, for which I paid the said Philip T. Schley the sum of fifteen hundred dollars. The property has never been changed by foreclosure and sale of the said negroes, and, therefore, I desire my executors to do so.

I give and bequeath to my said son, William K. Schley, my gold watch. \* \* \*

"Seventhly—I give and bequeath unto my said nephews, James H. Maxwell and William Schley, Jr., Esq., the remainder in fee simple, after the termination of the life estate granted to my wife in and by the second item of this, my will, of my lot and houses on the northwest corner of Broad and Campbell streets, in the city of Augusta, where I now reside, and which I purchased from Mr. Lambert Hopkins; that is to say, I give and bequeath the said lot and houses to the said James H. Maxwell, and William Schley, Jr., Esq., as trustees as aforesaid, in fee simple, subject only to the said life estate hereinbefore given to my wife by the said second item of this, my will. I also give and bequeath unto the said James H. Maxwell and William Schley, Jr., Esq., as trustees aforesaid, all and singular, the rest and residue of my estate, real and personal, which may remain after payment of my debts and the legacies hereinbefore mentioned, and which may arise or accrue from any source or cause whatever.

"To have and to hold all and singular the said remainder, after the death of my wife; and all the said residue of my property, real and personal, to them, the said James H. Maxwell and William Schley, Jr., Esq., and to their heirs, executors, administrators and assigns, as trustees aforesaid, forever in fee simple. But upon this special trust and confidence, nevertheless, that is to say, that they, the said James H. Maxwell and William Schley, Jr., Esq., and their heirs, executors, administrators and assigns, shall have, hold and keep possession of the same and every part thereof, and invest the said residue in productive stocks or other property which will vield a fair income, and receive and collect the rents, issues, profits and income from time to time, and pay over the same to my daughter, Anna Maria Davis, and my son, Dr. William K. Schley, share and share alike; that is to say, one-half of the said income to each of them, for and during the full term of their natural lives. And in the event of the death of either of them, then one-half of the said income of the said property, which would have gone to the deceased child, shall be paid over (if it should be my daughter who should first depart this life), to her four children, Isabella B. Smith (the wife of John Smith), for her sole and separate use, free from the control of the said John Smith, Sarah N. Davis, Charlotte N. Davis, and Richard Henry Davis. And if it

should be my son who departs this life first, then the one-half of the said income shall be paid over to his children, share and share alike.

"And when both my said children, Anna Maria and William K., shall have departed this life, then it is my will and desire that all the property mentioned in this item of my will shall be equally divided among and between the said four children of my said daughter, Anna Maria Davis, and all the children of my said son, William K. Schley, share and share alike, and freed and discharged from any further trust or confidence whatever.

"But the part or share that may fall or may be allotted to my grand-daughter, Isabella B. Smith, I do hereby declare to be for her sole and separate use, entirely free from the control of her husband,

and not subject in any way for the payment of his debts.

"Eighthly—I do hereby order and direct that none of the property hereinbefore conveyed in trust, shall be used or applied to the payment of any debts now due, or that may hereafter be contracted by my said daughter, Anna Maria Davis, or my sons, Dr. William K. Schley or George H. Schley; and, further, that the said property shall not be sold or otherwise disposed of, except to be reinvested in better or more profitable stocks or property, and conveyed to the same trusts and for the same uses and intents as was the said property thus sold; even though a court of equity should be disposed to do so, by the wish and consent of all the parties interested, and of the trustees, as, to the disgrace of these courts, both in England and the United States, they have often done in cases of wills and marriage settlements, thereby defeating the will and true intent of the testator, and of the victimized wife, in cases of marriage settlements.

"A portion of my property consists of sixteen \$500.00 bonds of the Montgomery and West Point Railroad, which said bonds are on deposit in the Branch Bank of the State of Georgia, of Augusta; ten of which said bonds are given to my wife in and by the second item of this, my will, and the other six (6) bonds will form a part of my estate to be divided with my other property according to the provi-

sions of this, my will, etc."

William Schley alone proved the will, and was qualified as executor. It was admitted that the lessors, Smiths and Mrs. Corbin, were now of full age and were living in the year 1862. Here the plaintiffs closed their case.

Defendants tendered and read in evidence to the court, the record of a petition and decree, and a deed of conveyance thereunder, to J. Rhodes Browne, a copy of which record and deed is as follows:

"The petition of William Schley respectfully shows that heretofore, to-wit: on the third day of April, 1858, the Hon. William Schley, then residing in the county of Richmond, in the state aforesaid, and in life, but since deceased, made, published and declared his last will and testament, which has been duly proved and recorded, by which, among other bequests and devises in said will contained, he gave and bequeathed to his nephews, James H. Maxwell and William Schley, both of said county of Richmond, as trustees for his daughter, Mrs. Anna Maria Davis, and such of her children as are in said will named, to-wit: Isabella B. Smith (the wife of John Smith), Sarah Ann Davis, Charlotte Davis, and Richard Henry Davis, testator's grandchildren, and being four of the children of his said daughter, Anna Maria Davis, among other property, the following houses and lots, to-wit: All his houses and lots in the city of Columbus, Ga., known as the "Old Columbus Bank lots." where his said daughter, Mrs. Davis, resided at the time of the fire which destroyed that part of the city of Columbus: which said property was conveyed to said testator by the sheriff of Muscogee county, and has been rebuilt since the fire with three The said premises include an alley on the back part of store-rooms. said lots and stores: which said lots and houses are now in the possession of my said daughter, or are rented out by her. And your petitioner hereto attaches a correct exhibit from said will, showing the various provisions made by the said testator for the benefit and support of his said daughter and her four children above named. which is made a part of the petition. And he also herewith exhibits to your Honor a full and complete certified copy of the said last will of the said testator, that your Honor may be fully informed of the purposes and objects of the testator in creating the trust estate re-And the petition shows to your Honor that the rents arising from the said three stores on Broad street were relied upon, and have been the main source for the support and maintenance of Mrs. Davis and her family. But your petitioner shows that such has been the condition and state of the times for two or three years past that the said three store-houses are not in demand, and if rented at all, it can be done only for a month or two at a time, or if for longer time, that the rents amount to but little. Your petitioner shows to your Honor that the rents annually arising from said three store-houses amount only to the sum of about one thousand dollars, and that, after paying the state, county and city taxes, together with insurance and necessary repairs, and to which may now be added Confederate States tax, the whole rents will be absorbed and nothing will be left for the support of Mrs. Davis and her family. How long this state

<sup>&</sup>quot;THE STATE OF GEORGIA-Muscogee County.

<sup>&</sup>quot;To the Hon. E. H. Worrill, Judge of the Superior Court in and for the Chattahoochee Circuit, in said State:

of things is to continue it is impossible to foretell, but one thing is certain, that it is absolutely necessary that some immediate and reliable provision must be made for the support of this family, who are made the peculiar objects of solicitude of the testator in his said last will. Your petitioner refers to the eighth item in the will of the testator. in which he contemplates the possibility of a necessity for a change of the property devised by him in trust for the benefit of his children. and while he manifests all that care and caution for which he was remarkable, by prohibiting the sale or disposition of said property, he makes the exception that it may be done to be reinvested in better or more profitable stocks or property and conveyed to the same trusts, and for the same uses and intents as was the property thus sold. Your petitioner further shows to your Honor, that he is informed and believes that the favorable location of said three stores makes them desirable to capitalists as a permanent investment of their surplus money. and judging from other sales which have been made of like property in the city of Columbus, it is believed that said stores will bring at public auction sale, twelve or fifteen thousand dollars each, and perhaps more. If this sum can be obtained for said property, and the proceeds invested in state or Confederate States bonds, bearing interest, it is believed that it will afford a more ample, certain and permanent provision free from taxes and insurance, and under whatever exigency may occur in our national affairs it is believed that the investment in government bonds will be as safe as any other property.

Your petitioner, therefore, believing it to be best to sell the said property, and having the consent of all parties interested, prays that your Honor may grant an order authorizing the sale of said three stores at auction sale, and that your petitioner may be authorized to invest the proceeds arising from the sale of the same in state or Confederate States bonds, secured to the same trusts and for the same uses and intents as is the said property by said will. And your petitioner shows that he is the only acting executor of said will, and trustee for Mrs. Anna M. Davis, the other appointed executor and trustee, James H. Maxwell, having declined to qualify as executor or to act as trustee.

"GRORGIA-Muscogee County.

Before me, Wiley Williams, a notary public in and for said county, personally appeared William S. Davis, who, being duly sworn, deposes and says, that the facts set forth and contained in the foregoing petition are, to the best of his knowledge and belief, true.

WM. S. DAVIS.

Sworn to and subscribed before me this the 20th day of August, 1863. Wiley Williams,

Notary Public Muscogee County, Georgia."

# "GEORGIA-Muscogee County.

Before me, John R. Ivey, a justice of the inferior court in and for said county, personally appeared Mrs. Anna Maria Davis, who, being duly sworn, deposes and says, that she is the daughter of the late Hon. William Schlev. late of the county of Richmond, in said state, for whose benefit and the benefit of her children her said father created the trust estate mentioned in his last will, as is shown by said will; that the three brick stores in Columbus, which was devised in said will to the use of deponent and her children mentioned in said will. has been mainly relied upon by her for a support, and with the aid of which she has been able to maintain herself and children. That for two years past the rents of said houses have so depreciated that after the payment of state, county and city taxes, together with insurance and repairs, nothing of the rents remained, and the same has ceased to be a source of revenue to her. That the condition of her landed property is such that the rents of said houses at good prices, as in former times, were required to afford to her and her children a competent support; this having failed, it will be absolutely necessary to sell a part of the corpus of her trust estate for her support and the support of her children, which was not anticipated by her father in the provision made for her in his said will. In this exigency, she has been advised by her friends that it is best to sell said three store-houses in Columbus, and invest the proceeds arising from the sale of the same in interest-paying bonds of the state or Confederate States, and deponent says she concurs in this suggestion, and prays that the petition of her trustee, William Schley, Esq., may be granted. Deponent further says, that three of her said children have, in their own names, consented to said change of property. guardian for Richard Davis, who is of imbecile mind, and for whom she has a peculiar care and solicitude, has consented to said sale; so that all parties in interest have assented to said sale.

ANN M. DAVIS.

Sworn to and subscribed before me on this, the 20th day of August, 1863.

JOHN R. IVEY, J. I. C."

## "GEORGIA-MUSCOGEE COUNTY.

Before me, Wiley Williams, a notary public in and for said county, personally appeared R. R. Goetchius and John J. McKendree, who, being duly sworn, depose and say, that they are well acquainted with the three store-houses in Columbus, referred to in the foregoing petition; that they consider the property valuable for mercantile purposes in ordinary times, but owing to the present condition of our national affairs, there is but little demand for store-houses, and they know that the rents arising from said stores are merely nominal and uncertain at any price. They believe that the taxes, insurance and repairs on said houses will nearly, if not quite, absorb all the rents

arising from the same, and have no hesitation in saying that during the present war, the rents of said stores will be a small and uncertain reliance for the support of a family. Deponents say that the property is elegantly situated on Broad street, and that capitalists will probably be induced to pay full and fair prices for the same as an investment of their surplus money. Deponents say that, considering the condition of Mrs. Davis and her family, they believe that she will be benefited by the proposed sale of said property, and that, in their opinion, the estate cannot suffer by the proposed change.

R. R. GOETCHIUS,
J. M. M. CKENDREE.

"Sworn to and subscribed before me, this the 31st day of August, 1863.
WILEY WILLIAMS,

Notary Public Muscogee County, Georgia."

"AT CHAMBERS, September 2, 1863.

"Having considered the foregoing petition of William Schley, trustee for Mrs. Anna Maria Davis, together with the several affidavits thereto attached, as well as the exhibit from the will of the late Hon. William Schley relating to the estate created in part for the said Anna Maria Davis and her four children; and having also examined the certified copy of the last will of the said late William Schley, deceased, exhibited to me with the foregoing petition; and it appearing to me that all the parties interested in the property mentioned in said will, have consented to the sale of the same; and being of the opinion, from the said petition, and the evidence under oath to said petition atached, that the sale of the property referred to will materially benefit the said cestui que trust, and will not injure the said trust estate, but may enhance the value and productiveness of the same—

"It is therefore ordered and decreed, that the said William Schley, trustee as aforesaid, shall have the power and authority to sell the three said brick stores and lots mentioned in said petition, at public auction sale, to the highest bidder, in the city of Columbus, giving reasonable and proper notice of the time and place of said sale. That the said William Schley, trustee as aforesaid, shall receive the purchase money for the same, and shall make a good and valid title to the purchaser or purchasers for the same, which shall bar and foreclose all the rights, title and claim of the said Anna Maria Davis and her said four children, and all persons claiming under them.

"And it is further ordered and decreed, that the said trustee shall have the power and authority to invest the proceeds arising from the sale of said houses and lots in state or Confederate States Bonds, which shall be held by him under the same trusts and for the same uses and intents as the said houses and lots are held by him under the provisions of the will of the said William Schley, deceased.

"It is further ordered, that the clerk of the superior court of Muscogee county enter the said petition, affidavits, extracts of the said will of the said William Schley, and this decree, upon the minutes of the superior court of said county, as required by law; and that the said clerk deliver a certified copy of the same to the said William Schley, trustee as aforesaid, upon the payment of costs.

Given under my hand officially.

EDMUND H. WORRILL, J. S. C. C. C."

"Columbus, Ga., August 24, 1863.

"The undersigned, lcgatees under the will of William Schley, deceased, late of the county of Richmond, Georgia, and cestui que tusts of the property described in the foregoing petition of William Schley, our trustee under said will, do hereby acknowledge due notice of the aforesaid application for leave to sell said property, and to invest the proceeds in Confederate bonds, and we hereby consent and agree that a decree be granted by the court for said sale and investment.

Anna Maria Davis.

Life tenant.

RICHARD H. DAVIS,
By his mother, Anna Maria Davis, guardian.
SARAH H. DAVIS.
THOS. F. RIDENHOUR,
In my own right, and in right of my wife.

CHARLOTTE TAYLOR.
ISABELLA B. SMITH.
CHARLOTTE F. RIDENHOUR."

"THE STATE OF GEORGIA-Muscogee County:

"Whereas, William Schley, Jr., of the county of Richmond, in said state, duly appointed by the last will and testament of the Hon. William Schley, deceased, as trustee for Mrs. Anna Maria Davis and her four children in said will named, of the county and state first aforesaid, did make application to the Hon. E. H. Worrill, judge of the superior court of the Chattahoochee circuit, in said state, for leave to sell the property hereinafter described, devised by the said Hon. William Schlev, in his said will, to the said William Schlev, in trust for the said Anna Maria Davis and for her four children therein named. And whereas, upon the petition of the said trustee and the evidence therewith submitted, all parties in said property consenting thereto, the said Hon. E. H. Worrill did heretofore, to-wit, on the second day of September, in the year eighteen hundred and sixty-three, make a decree, authorizing the said trustee, upon proper and reasonable notice to sell said property at public sale to the highest bidder; and that the said trustee should make a good and valid title to the purchaser for the same, which should convey and foreclose all the rights and title of the said Mrs. Anna Maria Davis and

J. t. %.

her said children, named in said will, in and to the same, which decree has been duly recorded by the clerk of the superior court of Muscogee county, as directed by law.

"And whereas, said trustee did duly advertise the sale of said property in a public newspaper published in the city of Columbus, as well as by printed handbills posted in said city, and employed Messrs. Rosette, Lawhon & Co., licensed auctioneers of said city, to sell the same.

"And whereas, the said property was offered for sale by said auctioneers, at the instance of said trustee, at public auction, in the city of Columbus, in said county of Muscogee, on Wednesday, the seventeenth day of September, in the year eighteen hundred and sixty-three, within the usual hours of sale, to the highest bidder for cash, in pursuance of said advertisement; and J. Rhodes Browne being the highest bidder, the same was knocked off to him at the price of twenty-two thousand one hundred and fifty dollars.

"Now this indenture, made this, the seventeenth day of September, in the year eighteen hundred and sixty-three, between William Schley, as trustee for Mrs. Anna Maria Davis and her children, as aforesaid, and by authority of the decree aforesaid, of the first part. and J. Rhodes Browne, of the county and state first aforesaid, of the Witnesseth that the said William Schley, trustee as aforesaid, for and in consideration of the sum of twenty-two thousand one hundred and fifty dollars, to him in hand paid by the said J. Rhodes Browne, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, doth hereby grant, bargain and sell to the said J. Rhodes Browne, his heirs and assigns. all that lot of land lying and being on the west side of Broad street. in the city of Columbus, between St. Clair and Crawford streets, and now occupied by John J. McKendree, Esq., as a store-house, having a front on Broad street of twenty-two feet, and running back one hundred and forty-seven feet ten inches to the original line of said lot, being a part of lot No. ---, in the original plan and survey of said city, and now designated as tenement No. one hundred and twentyseven, saving and excepting the alley on the west end of said lot, as heretofore detached and granted to the use of the proprietors of said original lot, and to the use and benefit of which alley the said J. Rhodes Browne, his heirs and assigns, are entitled, in common with others, to the use of the same as an outlet to St. Clair street, together with all the rights, easements, improvements and privileges thereto belonging, or in any wise appertaining.

"To have and to hold the said lot and improvements hereby granted to the said J. Rhodes Browne and to his heirs and assigns, to his and their use and benefit forever. So that the said trustee, or the said Anna Maria Davis or her said children named in said will, or any person claiming under him or them. shall not hereafter have any

right, claim or title to said lot by virtue of any right heretofore vested in them.

"In testimony whereof the said William Schley, trustee as aforesaid, has hereto set his hand and seal on the day above written.

WILLIAM SCHLEY [L. 8.],

Trustee for Mrs. Anna M. Davis and her children. Recorded September 23, 1863. F. M. Brooks, Clerk. Signed, sealed and delivered in presence of Alfred Iverson,

WILEY WILLIAMS,

Notary Public Muscogee county Georgia."

Here the defendant closed his case. This record presents for our consideration and determination various questions, none of which, although argued with great learning and ability, are in the view we take of this case, material to the real issues which it presents, except such as relate to the rights of the plaintiffs to maintain this suit, and to the execution of the power conferred upon the trustee under the will to convert the property bequeathed in trust for Mrs. Anna Maria Davis, her children, and grandchildren.

In order to recover in ejectment, the lessors of the plaintiffs must rely upon the strength of their own title and not upon the weakness of their adversary's; the defendants' possession will prevail against anything but a good title in the lessors of the plaintiff or a perfect right to the possession of the premises.

- 1. The demise from William Schley as executor of the will is not available in this suit; in that character it is evident from the very terms of the instrument, he took no title to the lots in question. They are devised to him and Maxwell, "their heirs, executors, administrators and assigns as trustees" for the testator's daughter, Anna Maria Davis, and such of her children as in said will are thereinafter named, and they are thereby expressly nominated and constituted such trustees. The title was conveyed to the trustees and not to the executors. Expressio unius est exclusio alterius.
  - 2. There can be no recovery upon the demise from the

Browns and Smiths, including Mrs. Corbin, because neither by operation of law nor by any species of conveyance, did the title ever pass out of the trustees and vest in them. In no view of this case could they become the owners of this title, so long as their grandmother, Mrs. Davis, was in life, to say nothing of the continuance of the lives of their own mothers respectively. There is no doubt, from the clearly expressed desires of the testator, as contained in his skillfully drawn will, that the property was held in trust for Mrs. Davis during her life; that the trustees were compelled to leave her in the possession of the same, and to permit her to enjoy the entire rents, issues and profits arising therefrom for her own use and support, and after her death to apply the entire income to the support of her children named in the will, or such of them as might survive her, so long as such of them lived. Until the interests of these successive cestuis que vie, first Mrs. Davis, and after her her four children, were fully satisfied, the contingency had not happened upon which the title to the property could pass to these lessors of the plaintiff. On the argument here, this position appeared so impregnable that it was not assailed.

3. The next and last demise we shall consider is that from the trustee, which brings up for determination what appears to us as the only question material to the issues involved. Was this sale and conveyance to the tenant in possession a valid execution of the power to the trustees to sell and re-invest this trust property, in certain events which had been foreseen and provided for by the testator? The trustees are enjoined not to permit any part of the property to be carried or conveyed beyond the limits of the state of Georgia, nor to be used or expended for Mrs. Davis, as the true object, intent and meaning of the conveyance to them was "to secure a support for her during her life, from the rents, issues, profits and income of the said property, without in any wise lessening or impairing the principal." By this same item of the will, ten thousand

dollars in money was given these trustees, which they were directed to invest in "safe and profitable stocks, or other property and securities, which would yield a fair and good income," and which they were to employ in carrying out Two objects are here quite apparent, the first is the maintenance and support of the cestui que trust, the second, the preservation intact of the corpus of the property bequeathed. Similar provisions had been made in favor of other children of the testator; and foreseeing that circumstances might arise which would render it impracticable to carry out these features of his scheme without a change of the property and a re-investment in different property, he repeated the restrictions above mentioned, and by item 8th of his will, he expressly ordered and directed that none of the property therein before conveyed in trust should be used or applied to the payment of any debts then due or that might thereafter be contracted by his daughter, Anna Maria Davis, or his sons, Dr. Wm. K. Schley or George H. Schley, and further that the property should not be sold, or otherwise disposed of except to be reinvested in better or more profitable stock or property. and conveved to the same trusts and for the same uses and intents as was the property sold, even though a court of equity should be disposed to do so, by the wish and consent of all the parties interested, and of the trustees, as, to the disgrace of those courts, both in England and the United States, they have often done in cases of wills and marriage settlements, thereby defeating the will and true intent of the testator, and of the victimized wife, in cases of marriage settlements." This restricted power applies to the property in question and also to that conveyed for the families of William K. and George H. Schley, which constituted all the trust property conveyed by previous Here express power is given either to items of the will. the trustees or court of chancery to sell for re-investment. whenever one or the other shall deem such re-investment proper to increase the income from the trust property.

Under no other circumstances and for no other purpose can either, by the terms of this will, dispose of the *corpus* of the estate. Any course upon the part of the trustee which would have deprived Mrs. Davis of support, or which would have brought any portion of the trust estate to sale for that purpose, would have defeated two of the main objects which the testator had in creating the trust.

Now was this sale for re-investment necessary to secure Mrs. Davis a support? If it was not, or if that in which the re-investment of the proceeds of the sale was to be made was not likely to vield a better income than the property as it then stood, and this fact was apparent, then it might have been deemed an abuse of discretion on the part of the trustee, if he had acted without any authority from the court of chancery, or had made misrepresentations to that court; and the purchaser, if he had concurred in this abuse of trust would have taken no title to the estate thus purchased. But from the mere fact of the reinvestment of the proceeds of the sale having resulted unfortunately, we should be going very far to impute such serious dereliction from duty either to this trustee or the purchaser from him. The wisest and most sagacious could not at that time foresee the result of the war then raging. or predict the effect that result would have upon securities issued by either the state or Confederate government. was quite apparent from the papers before the chancellor when he ordered this sale for re-investment, that the property did not yield income enough to support the cestui que vie, and that an encroachment upon the corpus would have to be made for that purpose, unless some more profitable investment could be found; and he thought from all the facts, after what seems to us a most careful investigation, that the proceeds invested in state or confederate securities would preserve the estate and afford the support with which it was charged. By changing one species of property for another, none of the provisions of this trust would

be violated or would fail, but the main purposes of its creation would be literally fulfilled.

Coming to this conclusion, the sale was ordered, and J. Rhodes Brown became the purchaser at a fair price, and took the trustee's conveyance to the fee of the property, and went into possession, where he remained undisturbed for about nineteen years. Being a purchaser bona fide and for a valuable consideration, it would take more than a mere mistake of judgment, as disclosed by events subsequent to the sale and conveyance, to divest his title. Both courts of law and courts of equity have gone very far to protect such purchasers, even where they held under doubtful or irregular sales or defective and incorrect judgments of courts having jurisdiction of the subject-matter. Dotterer vs. Pike, 60 Ga., 29; Mills vs. Banks, 3 P. Wms. R. 1.; Iverson vs. Saulsbury, trustee, 65 Ga., 724, 739.

It is insisted by the plaintiff in error, that the children of Mrs. Smith and Mrs. Brown, who were in esse at the time this decree of sale was made, should have had notice and been made parties to the proceeding through their guardian ad litem, which was not done, and therefore the proceeding is not valid as to them, and the purchaser took nothing but the estate, to which the life tenants (all of whom were parties) were entitled. Now whether these persons took as contingent remaindermen, or as remaindermen at the expiration of the trust, is quite immaterial; in any event the vesting of the estate in them would depend upon the contingency of their being in existence, upon the termination of the two preceding life estates, and when this decree was had all the life tenants were in being: in fact, Mrs. Davis did not die until 1879, and Mrs. Ridenhour, one of the life tenants, is still living. It was, ther fore, then impossible to ascertain in whom the estate would vest upon the falling in of the several life estates. would, it seems to us, have no more right to be made parties to such a proceeding than would an heir-apparent to a proceeding to sell the estate of his ancestor.

the case of Dean vs. Central Cotton Press Com-4 Ga., 670, has gone far towards the decision of stion. The principle therein announced, that the r represented an unborn contingent remainderman, t no one else could represent him, embraces the case. But the interest which the Code requires presented in such proceedings must, from the very f things, be certain and vested, and not wholly unand contingent. §\$2327, 4221to 4224, prescribing st property is to be sold and the parties to be vith notice of the proceeding, makes no mention of who may have such interests. It is a general e that courts do nothing nugatory and vain, and to what is here insisted upon would be impossible. ave no prescience that would enable them to dethe persons who would take upon such a contin-Judges have no more power than other men to o the future, and they are not expected to be able vhat even a day may bring forth. el's Chancery Practice 266, lays down this rule he subject: "In cases of this sort it is necesat not only he who has the first estate of ine should be before the court, but that the diate remaindermen for life should be parties. me rule will, as we have seen before, apply the intermediate estate is contingent or execuovided the person to take is ascertained; although he person to take is not ascertained, it is sufficient before the court the trustees to support the conremainders and the person in esse entitled to the sted estate of inheritance." It was impossible to n, when this decree for a sale was had, whether the and Smiths, who it is now claimed should have arties to the proceeding would ultimately take the their mothers were then in life. If this decree en made after the death of Mrs. Brown and Mrs. then the question of making them parties would

sted upon a solid foundation, and under that state

of things the point could have been urged with propriety. Their mothers, as we have seen, were parties, and proper parties, to the proceeding.

This, with other facts, distinguishes the present case from The City Council of Augusta vs. Radcliffe et al., 66 Ga., 469, so confidently relied upon by the eminent counsel for the plaintiffs in error. In that case the trustee had power, by and with the consent and approbation of the person or persons for whose use he might at any time hold the property, to sell and dispose thereof without the order or decree of any court, and reinvest the proceeds of the sale upon the terms of the trust, and none other.' Under this power a portion of the property was sold with the consent of the life tenant, who had a daughter of full age then in life, who was to take the remainder in case she survived her mother, but if her mother survived her, and she the daughter left issue living, then such issue should take in place of the daughter. The daughter gave no consent to this sale, but did afterwards upon two applications to change trustees, state that the property had been sold to the city of Augusta. She died before her mother, leaving six children, and upon the death of the mother these children succeeded under the deed to the estate. Upon suit brought by them, to recover the premises sold, this court held that the sale and conveyance of the property was not, under its peculiar terms. a valid execution of the power. Judge Simmons, who presided in Judge Crawford's place, delivering the opinion of the court, p. 474, said: "The law is exceedingly strict in requiring a precise compliance with the directions of the donor as expressed in the deed," 2 Washburn, 608. "Deeds of this sort usually give the trustee power to sell by and with the consent of the life tenant. does not do that. If it had been the intention of the grantor for the trustee to sell only with the consent of Mrs. Finn (the life tenant), how much easier and simpler it would have been to so have expressed it. But instead

of that he empowers him to sell with the consent and approval of the person or persons for whose use he may at any time hold." The daughter's recognition of the fact that the sale was made, was not equivalent to the consent and approval she was required to give in order to render the sale a valid execution of the power; the property being held for her use, as well as her mother's at the time it was sold and conveyed.

It is manifest that there is scarcely any point of resemblance between this power and that contained in George Schley's will, and there is still less similarity in the mode of executing the two powers. In that case the terms of the power were not complied with in its execution, and the title did not pass to the purchaser, whereas in this all the conditions upon which the power was to be executed were followed, and a court of competent jurisdiction interpreted the grant, and by its decree settled its meaning. The sale was made and the conveyance executed under this decree. The title passed out of the trustee and vested in the defendant in error. The demise, then, from the trustee in this action of ejectment, rests upon no title whatever. The admitted facts and documents in the case, show conclusively that he had neither title nor the right of possession, and as this is true of all the other lessors of the plaintiff, the court below very properly found for the defendant in the original suit.

This dispenses with the necessity of determining whether the defendant in error had a good prescriptive title; we have shown that he had a perfect title to the maintenance of which there is no necessity to call in the aid of prescription. Neither would it avail to show how this title should have passed out of the trustees and vested in the ultimate remainderman, since they were properly and legally divested of it before the happening of the contingency upon which they could have demanded a conveyance. They must look to the property in which the proceeds of the sale of this were invested, if they would assert their rights under the will of their ancestor. This sale was a full ad-

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ministration of the particular property in question, in accordance with the testator's desires as expressed in his will.

Judgment affirmed.

# IMBODEN et al. vs. THE ETOWAH AND BATTLE BRANCH, ETC., MINING COMPANY.

[This case was argued at the last term, and re-argued by order of court at the present term.]

- 1. Where one corporation has dealt with another company as a corporation, has negotiated with it concerning the waters flowing in a certain ditch, obtained permission from it to use those waters, and used them for years thereunder, dealing with the presidents, superintendents, attorneys and managers of the second company as officers and agents of a corporation, in a subsequent controversy growing out of the subject-matter of such recognition, the first corporation is estopped from denying the existence of the second.
- 2. Where those claiming to be the corporators of the second company at the time of the litigation—the president, superintendent and managers—are the same with whom the other corporation has dealt since the alleged illegal organization, and whom it has treated as such corporators, it is estopped from denying them to be such.
- 3. The evidence in the record is strong enough to show title to the water of the ditch in the defendant in error, and equity will enjoin the other company from depriving the complaining company of the use of its own whenever and wherever it may desire to use it.
- 4. It is not vital to this right of the complainant to use its own that it should make out an irrefragable title to the entire fee of all the lots, or either of them. If it owns any aliquot part of either lot, or any interest at all in a mine on either; or if it owns no mine at all, having dug the canal and put the water in a reservoir on a commanding height, whence that water may be distributed to surrounding lots whereon there are mines rich enough to be operated with water, it may use its own valuable estate in the water. It can do neither of these things, if the property in the water be destroyed by cutting and tapping the ditch which holds such water and carries it to the reservoir, thus drying it up.
- The verdict is quite certain on the main issues; as to the damager, there may be some confusion and uncertainty; this is ruled below.
- The evidence of the search for the original deeds was sufficient to warrant the admission of copies in this case.
- (a.) The deeds, the admission of which is complained of in the 10th

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and 11th grounds, were admissible, at least as written color of title, to support adverse possession.

- Conversations between agents of two companies, in which the one applied to the other for the use of water in a certain ditch, are admissible in a contest over the ownership thereof.
- 8. Receipts and drafts given and drawn by Kelly on the other corporators threw great light on the contemporaneous transactions between these parties touching their joint dealing in regard to these works and preparations for mining, and were admissible for that purpose.
- 9. Hearsay as to death is admissible testimony.
- 10. Court papers showing the assessment of damages in favor of a lot owner against a corporation, under its charter, for cutting a ditch through the land, in which assessment one person acted as agent for the company and another as attorney for the claimant, were admissible on a subsequent trial wherein another party claimed the water in the ditch through such agent and attorney.
- 11. A corporation can only make admissions through its agents, and the admissions of such agents acting within the scope of their powers and about the business of their agency, are admissible.
- 12. While a written conveyance cannot be altered by parol, parol testimony is admissible to explain what the granter claimed and the grantee bought as an easement belonging to the property conveyed.
- (a.) An ambiguity in a deed, latent or patent, may be explained by parol.
- (b.) The admissions of agents here objected to were admissible and relevant; if any were irrelevant, they did no harm.
- (c.) Admissions of the president of a corporation in connection with the business of his office are admissible against the corporation.
- (d.) That a witness, when asked if certain admissions had not been made to him by an officer of a corporation, replied that he thought they had, did not render the answer inadmissible; its weight was for the jury.
- 13. Exception to the entire charge is too general, and will not be ground for a reversal, if any part of it be good law. The plaintiff in error should particularize errors.
- 14. What the answer to a bill in equity admits as true, if charged in the bill, need not be proved, though discovery be waived; what the answer denies must be proved, if relied on by complainant; what the answer asserts as true is not evidence for defendant, if discovery be waived, but must be proved aliunde.
- (a.) If more specific instructions were desired, they should have been asked.

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- 15. If one company used water by lease or rent from another, the former was estopped from denying the existence of the latter as a corporation, and from denying its title while so using water under it.
- (a.) If complainant, or those under whom it derived title, constructed the ditch in part, and defendants, or those under whom they claim title, extended the ditch under a contract to complete it and return it all to complainant, after using the water for a time, then complainant was entitled to all the water at the end of that time.
- (b.) Whether a ditch was constructed jointly by three or severally by one, if it was constructed to be used in operating for gold on certain lots, and that one of the three who constructed it conveyed the mineral interest of these lots to the other two, with appurtenances and mining privileges, without making any reservation of the right to cut off the water then flowing in the ditch, or which could flow in it, neither he nor those claiming under him would have the right to divert the water from the property; and the owners would be entitled to its restoration, if so diverted.
- (c.) That a corporator is called Easterling in a charter, and Eastman claims to be the corporator, makes no difference, if the others have recognized him as the person intended, and so treated him, and received his money for joint enterprises.
- 16. If one has the use of another's property for nothing until called for by the owner, and when called for refuses to give it up, it would seem a sound principle that, to measure the damage of the owner, what the borrower made by the use would be a fair criterion; but if the property itself had been largely enhanced in value by the borrower, with the assent of the lender, not only in repairing, but in making extensive and costly additions to the *corpus*, that should enter into the true measure of damages to the owner.
- (a.) In this case the loan of water was not strictly a gratuity, there being counter-favors; the ditch was opened where partly filled; its capacity was doubled, and new streams were turned into it; water was rented on the opposite side of the river and carried across in pipes; at the time of demand for the ditch, the owner was not prepared to use it, nor was any customer shown therefor.
- (b.) Under the proof, a new trial is granted unless complainant will write off the damages awarded, in which case it will be affirmed. In either event, defendant in error must pay the costs of bringing the case to this court.

September 1, 1883.

Corporations. Estoppel. Damages. Easements. Verdict. Evidence. Admissions. Principal and Agent. Notice. Practice in Supreme Court. Waiver. Practice in Superior Court. Loans. Before Judge Wellborn. Lumpkin Superior Court. April Term, 1882.

Imboden et al. 18. The Etowah and Battle Branch, etc., Mining Cumpany.

The Etowah and Battle Branch Hydraulic Hose Mining Company filed its bill against Imboden, superintendent, and the Dahlonega Gold Mining Company to recover possession of a certain mining ditch or water canal, located in Lumpkin county, which directed the waters of Mill and other creeks by an artificial channel to a reservoir located on lot number 453, in the 12th district and first section of Lumpkin county; also to perpetually enjoin the defendants from interfering with the ditch or the water therein; to recover damages for the wrongful use of said ditch and water, and to set aside a conveyance of said ditch from one Kelly to Wimpy and from Wimpy to the Dahlonega company.

The substantial defendant, the Dahlonega company, pleaded that the complainant had no corporate existence and no right to sue in a corporate name. Defendant also answered, denying that it went into possession of the ditch as tenant of complainant, as the latter had charged, and claimed the ditch as its own property.

On the trial, the issues made by the plea and answer were submitted to the jury at the same time. The evidence was, in brief, as follows:

On December 13, 1859, the legislature of Georgia passed an act, by which Hezekiah Kelly, Reuben S. Denny and Arthur M. Easterling, and their associates, were incorporated, under the name of The Etowah and Battle Branch Hydraulic Hose Mining Company, with power to construct channels, ditches, canals and aqueducts for the purpose of directing the waters of Mill creek, Lilly's creek and Fletcher's creek from their natural channels for mining purposes. (The corporator's name in the charter is "Easterling," but throughout the transaction "Eastman" acted, and is the name given by the witnesses.) Kelly constructed a canal or ditch, directing the waters of these creeks to a reservoir on lot No. 453, where a mine was worked, and the ore flooded to a mill on lot No. 459, by means of water in the reservoir, in the year 1860. Kelly received from Denny

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and Eastman, on December 6, 1859, \$3,000.00 each, and gave a receipt, which specified that the amount was all the payment due in fulfillment of a contract between Eastman and Kelly "relative to lands, mines and improvements upon Hightower (Etowah?) river, in Lumpkin county, Ga." The contract mentioned could not be found. On February 20, 1860, Kelly drew a draft for \$1.000.00 on Eastman, and on July 19, another for \$1,275.00, both of which were accepted. On July 20, 1860, Kelly received from Eastman, \$959.00, and gave a receipt, stating that it was for "one-half of the working expenses of the Etowah and Battle Branch Mining Company, up to the first of August, 1860." Prior to this time, on December 23, 1859, Kelly conveyed to Denny and Eastman lots numbers 453 and 459, with all the rights, members and appurtenances belonging to them. On March 6, 1860, Kelly conveyed to Denny and Eastman the mineral interest in lots numbers 384, 387 and 388, "with full privileges of way, wood and water, with all and singular, the rights, members and appurtenances" belonging thereto. On February 5, 1868, Denny and Eastman conveyed the property to Daniel E. Somes. (It was so charged in the bill and copies of deeds from both Denny and Eastman were exhibited, but only the deed from Eastman was put in evidence, conveying his half interest.) On February 6, 1868, Somes conveyed onethird interest in the lots to Loomis, and on April 15, Somes and Loomis conveyed their interests to the Etowah etc., Company.

In 1861, at the breaking out of the civil war, Kelly left the state and went north. He left the ditch in charge of one Fletcher, and it fell into disuse.

In 1861, a Miss Castleberry proceeded to have damages assessed for cutting the ditch through her property. She proceeded against the company as a corporation, and John A. Wimpy acted as her attorney, and recovered damages.

In 1869, one Jordan (who is mentioned again below) brought suit against complainant as a corporation f r ser-

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rendered as their agent, and Fletcher, the agent left rge by Kelly, was served.

mine of complainant was known as the Thomas it was on lots numbers 453 and 459; the Battle h mine is the one now held by defendant, and is two down the river from the Thomas mine.

869, Harrison, Thomas and Bracket purchased the as mine at sheriff's sale, and worked it with the

Harrison testified that they held the ditch under but saw it lying idle and used it.

868, J. O. Jordan, whose suit is mentioned above, harge of the ditch, under Wing, a director of ainant; he used the ditch and remained in charge eighteen months. One Theis then took charge, 1871, under parol permission from Wing, he cut eral ditch for Graham, Perry & Free, from the oir to the Battle Branch mine, which they owned down the river, and the water was used to work nine for one season, when it was cut off. Their was on lots numbers 523 and 524, and they stockholders in the complainant. After this one y was employed by Wing, and had charge of the until 1874. In 1875, the Battle Branch mine was d by one Moore, who used water from the ditch. L. L. ard bought, through Moore, these lots, 523 and 524. new that the main ditch to the reservoir was in the sion of complainant, and through his agent, obtained ssion to use water from the reservoir through the ditch. In 1876, Lombard acknowledged to Price, torney of complainant, that he was using the water ditch and reservoir by permission of Wing, the or of complainant; in 1877, he made like acknowlent to one Purdy, and in 1878, to one Clark. The sions to Price were made in connection with the of permission by the company which he represented. Imissions testified to by Purdy and Clark grew out niries made by them as to mines which they thought 70-7

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of purchasing, and in the course of those conversations, Lombard stated that he had made arrangements with Wing to use the water in the ditch.

On May 21, 1877, the Dahlonega Gold Mining Company. was organized under the laws of New York, and Lombard conveyed to it lots numbers 523 and 524; he subsequently became the president of the company, and while such, made admissions as to using water by leave of complainant, which are set out above. Similar acknowledgments were made in 1877 by Altman, who became the president and agent of the company. (The evidence is not very clear as to the presidency of Lombard and Altman, but it would seem that Lombard had been the president of the Battle Branch company, to which the defendant succeeded; that on the organization of defendant, Altman became its president, and came out to take charge of the mine; and that at some time, not definitely stated, Lombard became the president of defendant.) Thomas R. Lombard, who was the son of L. L. Lombard, and had charge of the Battle Branch mine, went into possession in 1875. He also asked permission to use water from the ditch, and acknowledged that he was using it by permission of complainant.

While the Dahlonega company have been in possession they have extended the ditch and turned water from other creeks into it, about doubling its capacity. They also rented out or sold water on the opposite side of the Etowah river, and conducted it across the river in pipes, at an expense of several thousand dollars. It also appears that they crushed some ore for complainant without charge. There is no mining on complainant's land, and no preparations therefor; nor has there been any for some years.

Complainant's director, Wing, neard of no adverse claim on the part of defendant till Imboden took charge as superintendent of defendant's works in 1877 or 1878. While Wimpy claimed the property, he filed a bill setting up his right thereto, but it was subsequently dismissed.

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organization of complainant and its changes of offithus detailed by Wing: "I have been a director of nant since 1868, and a stockholder since that time. t meeting of the complainant that I ever attended v of, was in 1868, in Washington, D. C. D. E. S. L. Loomis and myself were the only persons We then agreed on officers: Somes, president; secretary, and myself, manager. We then and reed to issue stock. None had been issued before. ed 100,000 shares at \$5.00 each. Somes took  $33\frac{1}{8}$ d shares, Loomis 331 thousand shares, and myself usand shares. We adjourned that meeting to meet nlonega and ratify the proceedings in Wash-We met in Judge Rice's office in Dahlonega. Rice was made attorney of complainant, and conto hold that position till 1871, when he was sucby Colonel Price, in 1872. The meetings have

seen held in Colonel Price's office.

The stock books and minutes, at Free, in Chicago. The stock books and minutes, astood, were burned in Chicago in 1871. D. M. In was elected president in 1871, by a meeting held ago. I put Jordan in charge, and to clear out the hen Theis. I don't know how Moore used the I put Woody in charge of it.

mis, Somes and I formed the company, and Somes omis made the deeds to the company. They sold tam, Perry & Free, and they sold the Battle Branch o Moore. Moore wanted to buy the property of our cy, but did not; our company never parted with to the property or ditch. A. Davidson is presiour company now. The present company is the or of the company in Washington City. Davidson interest in the company through us.

we Theis permission to extend the ditch to the Battle mine. Thomas Lombard never gave me any noan adverse claim to the ditch. The first notice I Imboden et al. vs. The Etowah and Battle Branch, etc., Mining Company,

had of defendant's claim to the ditch was in 1877. I sold a controlling interest in the company to Mr. Betz, of Philadelphia, in 1877. Our company spent on the mine and ditch \$2,700; of this \$1,500 was on the ditch. The reservoir had to be enlarged. My permission to Graham, Perry & Free to use the water was verbal; so as to Thos. Lombard. I did not use the water in 1877, because I was enjoined by John A. Wimpy.

"All the authority I exercised in the matter was derived from the meeting in Washington City and the meeting held in Dahlonega afterwards. Loomis was present at the meeting held in Dahlonega to ratify the proceedings in Washington City. I was present, and my attorney, Judge Rice; no one else was present. Somes was not here. Kelly was not present. Neither Reuben S. Denny, nor Arthur M. Eastman, nor Arthur M. Easterling, was present. I never have seen either of these three men. Neither Kelly, Denny, or Eastman were present at the meeting in Washington City. I know of no meeting ever being held before the one in Washington City. The stock was divided between Somes, Loomis and myself, and issued to us. The subsequent parties, Graham, Perry & Free, Betz and Davidson, all derived their interest and authority from us. The present complainant is a continuation of the company which met in Washington City, as I have stated. jority of the stock in the company was represented in the meeting held in Dahlonega to ratify the proceedings of the meeting in Washington City. Loomis and myself were here. No one owned any stock at that time except Somes, Loomis and myself. That stock was the stock we agreed to issue in the meeting in Washington City. We then informally agreed upon the officers and the issuing of stock, and elected the officers agreed on in Dahlonega afterwards. After this meeting I acquired stock sufficient to give me a controlling interest, and was manager and director of the operations of the company."

Powers of attorney from Eastman and Denny to Somes,

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prizing him to represent them at the meeting in hington, were introduced. They and Kelly were not to attend.

e chain of title set up by defendant was a deed from y to John A. Wimpy, conveying the ditch and water, February 17, 1871; a deed from Wimpy to the deant, dated December 20, 1878, conveying the ditch water to the defendant. Defendant also held a deed L. L. Lombard to lots 523 and 524 (known as the le Branch mining property), with appurtenances. bard held this under Moore, and he under Graham, y & Free. Moore and Graham each testified that the included the lateral ditch from the reservoir to the e, but had nothing to do with the main or Kelly ditch. 1879, Davidson, the then president of the complainnotified Thomas R. Lombard and F. M. Imboden, as ts and superintendent of defendant, that the comnant needed all its water, and would cease to furnish defendant, unless further arrangements were made. cut off the water from complainant's land, and took ession of the Kelly ditch. Several agreements were e in regard to giving notice before further action, all of ch are immaterial here. In January, 1880, defendant a new ditch so as to tap the main ditch above comnant's land, and diverted the water therefrom, so that owed in the new channel instead of the old. Comnant thereupon filed this bill. There was testimony he effect that there was an average of 100 to 125 ers' inches of water in the ditch, worth about twelve s per inch per day. Denny and Eastman are both ited to be dead. There was also some other testimony, ch it is unnecessary to detail.

n the close of the evidence, defendants moved to disthe bill, which was refused.

he jury rendered the following verdict:

We, the jury, find for the plaintiff the property in diseand the damage on 100 inches of water at twelve

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cents per inch per day for two years, or 560 days, \$6,700, and that the defendant put the water back in the ditch, for perpetual injunction, with cost of suit."

Defendants moved for a new trial, on the following among other grounds:

- (1) to (5). Because the verdict is contrary to law and evidence, and not authorized by the pleadings.
- (6.) Because there was no finding on the plea of nul tiel corporation.
  - (7.) Because the damages are excessive.
  - (8.) Because the verdict is void for uncertainty.
- (9.) Because the court admitted in evidence a copy of the deeds from Kelly to Denny and Eastman, over objection, on the ground that the originals should be produced. [As a foundation for their introduction, Price, the attorney of complainant, testified that he had never had the deeds; had searched for them in the office of the company in Philadelphia, and failed to find them; applied to a former treasurer of the company, who said they were destroyed by fire in 1871, and applied to every person of the company, present and former, who could likely have had them, and failed to find them.]
- (10.) Because the court admitted the original deed from Somes to Loomis.—It was objected to because not proved; not properly admitted to record; because it did not appear to have been executed out of Georgia; and because the certificate of acknowledgment did not show affirmatively that it was made before a person authorized to take such acknowledgments. [The deed was attested only by J. F. Collan, who then added a certificate thereof as a commissioner of Georgia in the District of Columbia.]
- (11.) Because the court admitted the deed from Somes to complainant as title to lots 384, 387 and 388. This was objected to, because the description of the land failed to state in what county or state the lots were, and because its execution was not proved. [The description is "all his right, title and interest in all those parcels or tracts of

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s lots numbered four hundred and fifty-three and four hundred and fifty-nine (459), con80 acres, more or less, and situated in the 12th and first section of lots in county of Lumpkin and Georgia. . . . Also all his right, title and interse mineral interest in and to lots of land three and eighty-four (384), three hundred and eighty-887), three hundred and eighty-eight (388), towith all improvements, ways, easements, rights, es and appurtenances," etc. It was attested by Blood, and John S. Hollingshead, commissioner of for Georgia, in the District of Columbia, and was al.

Because the court admitted in evidence the deed omis to complainant. [Same objections, etc., as

Because the court allowed Woody, a witness, to hat Theis said he was superintendent of complainbjected to as incompetent to show such relationthe existence of the company, and as hearsay.

Because the court admitted the evidence of the Woody, that Dr. Thomas Lombard said he used er by Wing's permission in 1875 and 1876.—This ected to as irrelevant and hearsay. The witness that he was employed by Theis, and paid by nd Loomis; got the money from Price; the water d on the lower or Battle Branch mine; after Moore, mas Lombard had charge; he was the son of L. L. d; after Dr. Lombard stopped using it, witness cut water; Mr. Altman, of New York, organized the nt's company, and said he was its president; after en Altman took charge of the lower or Battle mine, the water was cut off; witness did not ver water to Altman or give him permission to Altman came up to Dahlonega to see Betz (a r of complainant's company); does not know r he saw Betz or not; after Altman came back, he on the water himself; while Dr. Thomas Lombard

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was using it, he said to Mr. Wing: "I would like to have that water to work with from the ditch"; Wing said: "You have been so kind as to beat our ore for nothing, you can take the water till we want it"; Dr. Thomas Lombard was working the Battle Branch mine; this was in 1875 or 1876.]

- (15.) Because the court admitted testimony of Harrison, showing the same conversation as just above stated.—Same objection as in ground just above.
- (16); (17.) Because the court admitted the two drafts drawn by Kelly on Eastman, July 19, 1860, accepted payable to Denny, endorsed by Denny and Kelly; also the receipt of Kelly to Denny and Eastman, dated October 4, 1859.—Objected to as irrelevant, and because the contract mentioned in the receipt was not introduced or its contents proved.
- (18.) Because the court admitted testimony of a witness, Colgate, as follows: "I was not personally acquainted with Reuben S. Denny, but believe him to be dead from having heard so by word of mouth of the late A. M. Eastman, and have also seen documents relating to his death."

  —Objected to as hearsay and secondary.
- (19.) Because the court admitted the proceedings in the case of Castleberry vs. The Etowah and Battle Branch Hydraulic Hose Mining Company to have damages assessed for cutting the ditch through her land, and the f. fa. and entries thereon.—Objected to because they did not appear to be office papers of the superior court; because they were hearsay; because it did not appear that Kelly or any one else was notified or bound; because it was ex parte, and showed that Kelly was not in the country; because it did not bind defendant; because it did not appear that complainant paid the award; because there was no evidence that the ditch went through the plaintiff's land; because the judgment and f. fa. were illegal and irrelevant. [See report of facts above as to this suit.]

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.) Because the court admitted the record in the case rdan vs. The Etowah and Battle Branch Hydraulic Mining Company.—Objected to as hearsay; irreleand incompetent to prove incorporation of complain-

[See report of facts above as to this suit.]

.) Because the court admitted evidence of Wing that as Lombard, in 1875 or 1876, applied to him for , and said he wanted it to test a mine of J. E. Woods. jected to as irrelevant and hearsay. [Compare the

ground.]

2.) Because the court admitted testimony of Price, bstance, as follows: I was the attorney of complain-I learned that Moore was in possession, using the r, and I went to him about it; he said he had leave to he water from Graham, Perry & Free, who said he d be allowed the use of the water until the upper oany needed it. He recognized the Etowah and Battle ch Company's right to the ditch above the reservoir. t heard that Dr. Thomas Lombard was using the r; I went to see him about it; he told me he had y's permission to use the water from the reservoir. ecognized the Etowah and Battle Branch Company's to the water. He said that he did not think the er company would want it for a long time. He asked ess the effect of Wimpy's suit. The case was in court two years. Thomas Lombard frequently said he ght he would hold the ditch a long time, as the upper pany's mine was not a good one, and he did not think would ever put up a mill. In 1875 or 1876, I met Lombard at the Battle Branch mine; he said he was e mercy of the upper company for water, and that he found out he only owned that part of the ditch from reservoir on the upper property to the Battle Branch e. Tom Lombard recognized me as agent for the comwhile he was there.—Objected to as hearsay, irreleand incompetent to show title.

3.) Because the same witness was allowed to testify



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substantially as follows: In 1877, Altman took charge of the Battle Branch mine for defendant. The water was not then running in the ditch. I told Altman that Betz and other directors would soon be at Dahlonega, and Altman could see them and make terms about the use of the water. I told him I would not disturb him in the use of the water until the litigation with Wimpy was ended. I told him in the meantime I would tell Woody to let him have Altman said his company had been incorporated water. and listed on the stock board, and that if the water question was not settled, it would affect the stock; that L. L. Lombard had sold the lots to the defendant, and the latter had organized and owned the ditch up to the reservoir; that Lombard had told him that he (Lombard) had been using the water by permission of Colonel Wing. Altman proposed to make an arrangement to extend the ditch, take in the waters of other creeks, increase the water twofold, take out the water at the reservoir and divide it equally or equitably between the two companies; but no arrangement was made.—Objected to. [No ground stated.]

- (24.) Because the court admitted in evidence the testimony of the witness, Betz, substantially as follows: Witness was a director of complainant; he and another came out to Dahlonega; Altman went to see them; introduced himself to them; wanted to effect an arrangement for the use of water by his company, the defendant; he said that the only privilege they had so far was a verbal permission from Colonel Wing, who said they could use the water of the upper company until the latter started up, and that they would then have to make special arrangements for the water. [No ground of objection stated.]
- (25.) Because the court admitted the following evidence:

First. Witness Graham testified substantially as follows: Witness and his partners, as owners of the Battle Branch mine, did not claim the ditch, but had stock in the company that did own it, and extended the ditch by Wing's per-

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to the Battle Branch mine, and sold the extension tle Branch mine to A. H. Moore; he must have hat we sold only the extension, and he contracted in the company that did own the remaining part tch.—Objected to: 1st. Because the deeds would best evidence of what he sold. 2d. Because the was irrelevant. 3d. Because it related to connd conversations of persons not parties to the suit. d. Purdy testified substantially as follows: Loms president or vice president of defendant; he was its r. I had a conversation with him in 1877 or 1878 king hold of the property of the lower mine with him. m I could not do anything with it, unless the water was settled. The question was between Wimpy ag as to the ownership of the main ditch. Lombard had made arrangements with Wing to use the nd had it sure . . . Altman, who was at one time t of the defendant, made similar statements to ess.—Objected to as hearsay and irrelevant. Because the court admitted testimony of Moore, ially as follows: Bought the Battle Branch mining from Graham, Perry and Free; knew that purly included the lateral ditch from the reservoir to

ially as follows: Bought the Battle Branch mining from Graham, Perry and Free; knew that purly included the lateral ditch from the reservoir to e, and not the main or Kelly ditch, or any right; Graham, Perry and Free told him that there doubt that they could use the Kelly ditch for a e, as the Kelly mine was not using and not likely. Witness tried to buy a controlling interest in plainant, and failing in that, tried to rent the Kelly at also failed in that. Lombard knew of these fore his purchase, and conversed with witness on ect.—Objected to as irrelevant, secondary evidence, adding conversations and transactions to which de-

was not a party.

Because the court admitted testimony of a witness, ubstantially as follows: Wanted to buy a mine to hydraulic mining; Lombard said he knew a

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mine owned by the Etowah and Battle Branch company, which he thought was adapted to the purpose; that witness could get water from a ditch known as the Kelly ditch, which was claimed either by that company or by Wing; that he (Lombard) had made an arrangement with Wing to use the ditch and water on condition that Lombard would put the ditch in order and so keep it until needed by Wing; some four months thereafter, Lombard informed the witness that he had bought the Wimpy claim to the Kelly ditch, because he thought it a better title than that of Wing. These conversations occurred in December, 1878. and January, 1879. Lombard is president of defendant, and witness thinks he was then so.—Objected to as irrelevant and relating to transactions and conversations to which defendant was not a party. The witness also testified that "I think Mr. L. L. Lombard said to me that the Dahlonega com pany had procured the use of the water from Colonel Wing, and had the use of it only until the Etowah and Battle Branch company resumed operations in their mines."—Objected to as irrelevant, not binding on defendant, and as the mere thoughts of the witness.

- (28.) Because the court admitted testimony of Somes, substantially as follows: Kelly was notified to attend the meeting in Washington City to organize the Etowah and B. B. H. H. Mining Company, as shown by the papers attached.—Objected to, because the papers alluded to were not in evidence.—Also, that Eastman and Denny were both notified to attend the meeting to organize, in Washington City.—Objected to, because the notice ought to be in writing; because it was not shown how, when, or by whom such notice was given, and because no legal meeting for that purpose could be held in Washington City.—Also, that Eastman and Denny gave witness powers of attorney to represent them in said meeting, and that he represented them under power of attorney.—Objected to as secondary.
  - (29.) Because the court admitted in evidence a power

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Somes to represent him in the meeting called to April 4, 1868, in Washington City, to organize the ah and Battle Branch Hydraulic Hose Mining Comunder the charter granted by the legislature of ita. Witnessed by F. C. Somes, S. L. Loomis. The ation laid for the introduction of this power of attoras the testimony of Somes that Eastman gave it to his office.—Objected to by defendant, 1st. Because ecution was not proved. 2d. Because the subscribing sees were neither of them produced, nor their absence inted for. 3d. Because the power was void, being an pt to authorize an act ultra vires. 4th. Because the not appear to be a corporator.

- Because the court admitted a like power of attorney
   R. S. Denny.—Same objections as to that just above.
- .) Exception to entire charge as vague, uncertain, and not covering the issues.
- charge in writing, after charging that complainants ed that a charter was granted to Kelly, Denny and rling, added verbally, "said to be Eastman."
- .) Because the court charged as follows: "The priviand franchises conferred by this charter were conon these parties named and their associates and s."
- Because the court charged as follows: "If you are ed from the testimony that the complainants were a my organized as required by the charter at the time filing of their bill, and that they are the successors corporators named in the charter, and were in the the charter, then they would be authorized to use rporate name, and sue in that name."
- ) Because the court charged as follows: "That would acceptance if the original corporators constructed a under the charter."
- ) Because the court charged as follows: "The original

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corporators under the charter, named in the charter put in evidence, had the right to assign their interest, to associate others with them, and to have successors."

- (37.) Because the court charged as follows: "The charges and statements in the bill which are admitted to be true by the answer need no further proof; but all such matters as are denied by the answer to be true, it is incumbent on the complainants to sustain by proof, if relied on. The statements set up in the answer of defendants, although the answer is sworn to, are not evidence for the defendants, unless they are sustained by proof."
- (38.) Because the court charged as follows: "If you are satisfied from the evidence that the defendants rented or leased the ditch and water from the Etowah and Battle Branch Mining Company, then the defendants are estopped from denying the existence of the company during the existence of their tenancy."
- (39.) Because the court charged as follows: "If you should believe from the testimony, that the complainants, or those from whom they derive title, cut a part of a ditch, and that the defendants, or those from whom they claim, extended the ditch, under a contract or agreement with the complainants to complete it and return the entire ditch to the complainants after a certain use of it, then the complainants would be entitled to have all the water which flows through the ditch, pass on to them, if the time had expired that the defendants were to have the use of it."
- (40.) Because the court charged as follows: "If you should believe from the testimony that the ditch was constructed jointly by Kelly, Eastman and Denny, with their joint funds, or by Kelly alone, and that it was constructed to be used in operating for gold on the lots aforesaid, and that it was necessary to the use of the lots as a mine, and that Kelly conveyed all of his interest in these mineral lots, with their appurtenances and mining privileges, to Eastman and Denny, and made no reservation of the right to cut off the water thus flowing in the ditch, or about to

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irrned into it, above that point, neither Kelly nor those ing under him, would have any right so to divert it, the complainants would have a right to have the water to this property as when they purchased it."

1.) Because the court charged as follows: "If you ld believe that the ditch and the water flowing therein the property of the complainants, and the defendants of diverted the water and used it themselves to the age of the complainants, and without their consent, the complainants would be entitled to recover for ages such amount as the use of the water is shown to been worth for the time it has been used by the deants after the withdrawal of the consent of the compants; and if the defendants received the ditch from plainants and used it under them, they would be sped from denying their title, and setting up an adea claim to it until after notice to the complainant of adverse claim and attornment back to them."

L. SMITH; C. D. PHILLIPS; H. H. PERRY; L. E. BLECKfor plaintiffs in error.

R & BAKER · H. P. BELL; M. G. BOYD; A. DAVIDSON, efendant.

son, Chief Justice.

bill was filed by defendant in error against the plainin error to enjoin the latter from interference with the r of a long ditch or canal claimed by the former, to bel the restoration of the water to the original ditch anal, from which it had been diverted by the plaintiff fror by tapping that ditch above the lots owned by adant in error, and to recover damages for such diverof the water from the true owner thereof.

the trial of the case before the jury, a verdict was ered granting that injunction, directing the restoration Imboden et al. vs. The Etowah and Battle Branch, etc., Mining Company.

of the water, and rendering damages to the amount of six thousand five hundred dollars for the complainant against the defendant; and a decree in accordance with that verdict was entered by the chancellor thereon.

Pending the trial, a motion was made at the close of the testimony to dismiss the bill, and on the denial of that motion, error is assigned here. After verdict, a motion was made to set aside the decree, on various grounds therein taken, and to annul the same, and a motion for a new trial on a vast array of grounds therein taken.

These motions were all overruled by the court, and error is assigned here also on the judgment overruling them.

In the view which we have taken of the case, it will be unnecessary to consider all the grounds taken in these various motions. The ditch is very long and not free from mud, though traversing a mountain country; it was the duty of the plaintiff in error to remove enough of that mud to enable this court to see what of gold there was in the ditch, or at its extremity, for the Dahlonega corporation; and before the bill of the Battle Branch company could have been legally dismissed at the close of its testimony, the Dahlonega company should have opened the entire ditch to show that no gold at all was in it for that other contesting corporation. In other words, to show that its claim to the ditch had no equitable merit in it—no right to the water it claimed or the use of that water-and therefore no admittance at all, on the facts it made, to the temple of justice at its equitable door.

1. As well on this motion to dismiss as on the motion for a new trial, the plaintiff in error rested its case mainly on the idea that the Battle Branch company had no legal existence—no privilege to sue—and therefore the door should have been shut in its face at the outset; and after it had got in, what was done for it by verdict and decree should be undone, and a new trial awarded.

Unfortunately for the Dahlonega company, however, it dealt with the Battle Branch company as a corporation

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atedly, in respect to the waters of this very ditch. tually obtained its permission to use those waters; it ise those waters under that permission for years; it t with its attorneys, its presidents, its superintendents managers, as attorneys, presidents, superintendents managers of a corporation, known and recognized by the Etowah and Battle Branch Hydraulic Hose Min-Company. It called it by the name, the long nama, very remarkable and distinguished name, by which it clearly distinguishable from all the world of creatures, oreal and incorporeal, and which it had received by ism at the christening fount of the general assembly he state of Georgia. Surely such a recognition of the nt by name; such a dandling and handling it; such ng and cooing with it; such reception of gifts and rs from it; such drinking the water of the child's ditch permission of the little creature, must estop, in all ts, both of law and equity, the recipient of such favors denying the existence—the breath in the body of the g with whom it thus dealt so long and from whom it ived (much of it without money and without price, too,) nany favors.

his court, as indeed all civilized courts, has ruled that a recognition of a being—even of an artificial being—stop the mouth of any other being, natural or artificial, a denying, in a case growing out of such recognition, the being thus recognized ever had being. Planters' Miners' Bank vs. Padgett, 69 Ga., 159; Georgia Ice vs. Porter & Meakin, 69 Ga., 159. (This term; not

reported.)

his record abundantly and conclusively shows repeatrecognitions by the Dahlonega Gold Mining Company he Etowah and Battle Branch Hydraulic Hose Mining apany touching this water and these mines, so that the of the recognition and dealing of the one company in the other as a defacto corporation, is established; and Imboden et al. vs. The Etowah and Battle Branch, etc., Mining Company.

such being the fact, the law is that it must still recognize the old acquaintance as a live person.

So that the plea of "nul tiel corporation" is no legal plea, under the facts proved in this case; and the complainant can sue, and enter the court, and may abide there as a person entitled to sue this defendant and respond to it, or other persons through it, with whom it may be litigant touching this water.

2. It was with the present corporators, too, that it dealt, with the personnel now composing it, with the presidents, superintendents and managers, since the meeting in Washington City and afterwards in Dahlonega, Georgia; and hence, it cannot deny these organs—this personnel, by which alone the artificial equity can breathe, talk, grant licenses, make bargains, lease or give away its waterpower or other property, or otherwise act as a live person. Hence, everything in this record which attacks the defendant in error on any matters affecting the charter or the organization under it, or the place where it was organized, are swept away by the same principle which estops a denial of its existence as a living being.

These principles above indicated rule the points made in the 6th, 20th, 28th, 29th, 30th, 32d, 33d, 34th, 35th and 36th grounds of the motion for a new trial, as well as the error assigned on the denial of the motion to dismiss the bill on the ground that there was no proof of complainant's corporate existence.

3. But conceding, as plaintiff in error must, that the complainant is a corporation, is there evidence to show that it is entitled to relief in equity in respect to this ditch and the water in it, and the cutting off that water by the plaintiff in error? That depends on its title to the water in the ditch. How is the Etowah and Battle Branch Hydraulic Hose Mining Company entitled to the ditch and the flow of water therein? And is there evidence of title to that water in this record sufficient to uphold the verdict?

We are of the opinion, from a careful examination of

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evidence disclosed by the record, that the company, or who composed it originally, constructed the ditch and wed their title to it from the legislative grant of power construct it and the actual construction thereof by exliture of money therefor.

ezekiah Kelly supervised the work, employed the ls, and paid for it. By what authority could he conet such a work through the lands of others for fifteen venty miles as an individual? He could not, except surchase of the right of way through the lands of each er thereof, or the purchase of the lots themselves. record fails to show that he did either. On the other l, it shows that he, with two others, was made a body orate to do this very thing—to construct this ditch; the company thus chartered was called by the idenname it now bears; that it was chartered about the this work was commenced and in progress; that in same act another company, of which the same Kelly also a member, was chartered to construct another on the other side of the Etowah river; that the ters were granted upon the idea and for the purpose etting water to work mines, and to that end authorthe settlement of damage to the owners of lots through h the canals might be cut, as in cases of railway char-

was under this charter, beyond all question, that Kelly eeded to cut this ditch. The evidence further shows touching business connected with these mines and ditch, Kelly was paid by the other corporators of this pany. Receipts and drafts pointing closely in that tion, if not perfectly straight to that conclusion, are stimony, as the record shows. Eastman and Denny not corporators in the other company.

pere is, therefore, evidence to a moral certainty that the nal corporators paid for the ditch. One of them dug perintended and paid for the labor, and the other paid him therefor. The ditch so cut was carried to a

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reservoir on one of the lots owned by the same parties, and this reservoir was also dug by Kelly, and there this ditch at that time terminated.

Kelly first owned this lot, but conveyed it to the other two corporators, Denny and Eastman, on the 23d of December, 1859, with all rights, members and appurtenances, and on the 6th of March, 1860, conveyed to them the three other lots, 384-7-8, or all the mineral interest he had therein, with all necessary easements for mining purposes. About the same time the following receipt was given by him:

"New York, December 6th, 1859.

"Received of Arthur M. Eastman and Reuben S. Denny three thousand dollars each [six thousand dollars], being all the payments due in fulfillment of a contract between said Eastman and myself dated October 4th, 1859, relative to lands, mines, and improvements upon Hightower river, in Lumpkin county, Georgia.

H. Kelly."

**\$**3,000.**00** 

3,000.00

\$6,000.00

Another receipt was also given in the July following as follows:

"New York, July 20th, 1860.

"Received of A. M. Eastman nine hundred and fifty-nine dollars for one-half of the working expenses of the Etowah and Battle Branch Mining Company up to the first of August, 1860.

H. KELLY, Agent."

\$959.00.

And in addition to these receipts, two drafts were drawn by Kelly on Eastman for \$1,000 and \$1,275, on February 20th and July 19th, 1860, during the progress of the work, and were duly paid by him.

In addition to all this, it further appears that suit was instituted in 1861 against the company for the damage assessed under the charter to lots of land between the owners and Kelly, as agent of the company, brought by John A. Wimpy, as attorney for the plaintiff.

The defendant corporation, the Dahlonega Gold Mining Company, sets up in its answer title to the ditch from Kelly en et al. rs. The Etowah and Battle Branch, etc., Mining Company.

A. Wimpy, and Wimpy to them. Hence, Wimpy, amediate grantor, had full knowledge of the agency of for the company, and so the Dahlonega company e affected therewith.

e facts show that the company now suing—aftermore fully, by Denny and Eastman at Washington and Dahlonega, organized and put in operation by g officers—constructed the ditch, and certainly hold the water as against the plaintiff in error at least, and, under the organization thus put in operation, the of the ditch, recognizing the title of complainant

hat we think and hold that the evidence in the is strong enough to show title to the water of the n the defendant in error.

o, equity will enjoin the other company from deg the complaining company of the use of its own, bever and howsoever it may desire to use it, and will to the owners the use of its own ditch.

for is it at all vital to this right of the complainant to own water on mines located on certain lots, that it of make out an irrefragable title to the entire fee of lots, or of either of them. If it owns any aliquot of either lot, or any interest at all in a mine on either, cowns no mine at all, having dug the canal and put after in a reservoir on a commanding height, whence that may be distributed to surrounding lots whereon are mines rich enough to be operated with water, it see its own valuable estate in the water, or sell it for able sum of money to some other person, neither of can it do if the property in the water be destroyed deighbor cutting and tapping the ditch which holds after and carries it to the reservoir there, thus drying

se views, under the last two heads, will control many points in the motion for a new trial, embracing the 1, 3d, 4th and 5th general grounds, that the verdict

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is contrary to evidence, it not being contrary thereto in respect to the injunction, against the use of the water and commanding its restoration to the original ditch.

The 6th ground has been disposed of. The 7th relates to damages and will be hereafter considered.

5. The eighth charges that the verdict is vague and uncertain. The verdict is, "We, the jury, find for the plaintiff the property in dispute, and the damage on one hundred inches of water at 12 cents per inch per day, for two years or 560 days, \$6,700, and that the defendant put the water back in the ditch, for perpetual injunction, with cost of suit."

The verdict is quite certain on the main issues, as it appears to us. There may be some confusion and uncertainty about the damages in regard to the two years and 560 days, which will be considered hereafter.

- 6. The ninth ground is in respect to the admissibility of record copies of deeds lost. The evidence of the search for the originals was enough, we think, to admit the recorded copies, which are the next best evidence. The tenth, eleventh and twelfth grounds relate to the admission of other deeds. They appear to us admissible at least to support adverse possession, and as written color of title to that end.
- 7. The 15th ground was properly overruled. The conversation objected to was between agents of the two companies, and showed that the Dahlonega company used the water of the Battle Branch company, by permission of the Battle Branch company, through its agent at the time.
- 8. The 16th and 17th grounds are objections to the admission of the receipts and drafts given and drawn by Kelly on the other corporators, before alluded to, and which threw great light on the contemporaneous transactions between these parties touching their joint dealings in regard to these works and preparations for mining on the Etowah river. They were admissible for that purpose.
- 9. The 18th was properly overruled. Hearsay, as to death, is admissible testimony.

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the court papers of the suit of E. Castleberry against the Branch company, for damages assessed by rs under the charter, selected according to it, Kelly as the agent of the company and the plainsuit being brought by Wimpy as attorney, were le, because, as already stated, the Dahlonega comup title to the water under Kelly and Wimpy. Oth ground was properly overruled. The 20th has posed of.

the 21st, 22d, 23d and 24th grounds were properly of for the reasons that they were admissions of and officers of the Dahlonega company, and the ms of such agents acting within the scope of their about the business of their agency. Unless such ms are binding on a corporation, it cannot be y admissions at all. The only way in which a ion can talk and admit is by agents. It is dumb as deaf by itself, having no organs of speech or except by natural persons as its agents.

ne 25th relates to the interrogatories of Graham ory of the part of the ditch conveyed by himself mers to the Dahlonega company, or those under the claimed, to the point that the conveyance related to the ditch cut from the reservoir down to the null or Battle Branch mine, and not to the main that all. It does not alter, vary or add to the conveyance, but explains what the conveying party and the other side bought, as an easement. It issible, too, as explanatory of an ambiguity, which we Code of this state may be explained by parol, the ambiguity be latent or patent.

pround also objects to other answers which gave one of agents of the company, and has been already principle; and some of them are also said to be nt. They appear generally relevant; if irrelevant, shown how plaintiff in error was hurt.

35th ground, therefore, was properly overruled.

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The 26th relates to what the purchaser swore on this trial to the same effect, showing that he, Moore, understood the scope of the conveyance in the same way. The other objections to these interrogatories of Moore relate to admissions of agents of the Dahlonega company, and are controlled as to this point and irrelevancy as the 25th ground is ruled.

The 27th ground relates to Clark's interrogatories, and the objection rests on the inadmissibility of sayings and admissions of the president of the Dahlonega company. Of course they were admissible. It was for the jury to weigh what the witness said, whether positively recollecting the admission of Lombard, or thinking, to the best of his recollection, that he did say so and so. Besides, there is abundant other evidence of these admissions, and plaintiff in error was not hurt.

The 28th, 29th and 30th grounds have been disposed of.

13. The 31st ground objects to the entire charge without

specifications of particular portions as exceptionable. The rule in such cases is that if any part be good law, the objection will not be considered. In so far as this objection pronounces it all as vague, uncertain, not covering the issues and points, but going out of them—not presenting points of the Dahlonega company, but giving undue prominence to the Battle Branch company's points, inaccurate in statement and calculated to mislead the jury and erroneous, we have to say that we cannot so see it, and that the plaintiff in error has failed to particularize wherein it is thus so erroneous.

The 32nd, 33rd, 34th, 35th and 36th grounds have been disposed of.

14. There is nothing in the 37th ground. What the answer admits as true, if charged in the bill, need not be proved, though discovery be waived. What the answer denies must be proved in such cases, if relied on by complainants. What the answer asserts as true is not evidence for defendant. if discovery be waived, but must be proved

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These are rules so well established that it is apprising that points are made upon them as obole in a charge to the jury. If plaintiff in error my addition thereto as to admissions in complaint, and the effect of those admissions, the judge's a should have been called thereto. This was not or has any admission been pointed out to us in nant's pleadings which could have helped the defit the court had applied the principle without quested to do so. Plaintiff in error was not, theret by the omission.

ne 38th, 39th and 40th grounds of the motion comcharges to the effect that if the water was used Dahlonega company by lease or rent from the ranch company, the former was estopped from the existence of the latter as a corporation, and nying its title while so using the water under it; omplainants, or those from whom they derived title, ted the ditch in part, and defendants, or those unm they claim, extended the ditch, under a contract ment to complete it and return it all to complainr using the water for a time, then complainant was to all the water at the expiration of that time; t if the ditch was constructed jointly by Kelly, and Denny, with their joint funds, or by Kelly nd that it was constructed to be used in operating on certain lots, and Kelly conveyed the mineral of these lots, with appurtenances and mining privi-Eastman and Denny, and made no reservation of t to cut off the water then flowing in the ditch or ould flow in it, then neither Kelly nor those claimer him would have any right to divert the water mplainant's property, but they would be entitled storation if so directed.

kes us that there is evidence sufficient in the record orize these charges in substance; and the principles ws already announced seem to us substantially to Imboden et al. rs. The Etowah and Battle Branch, etc., Mining Company.

cover the legality of them as given. The doctrine of estoppel clearly covers the first, the 38th ground; the same principle would cover the 39th ground, especially as there is evidence tending to show a contract to the effect that the Dahlonega company, or those from whom they got it, were to cease using the water when notice was given to it to cease to use it, and then were bound by the contract to restore it, though while using the ditch permissively they did extend and enlarge its water-power. Nor is there more merit apparent to us in the last paragraph above substantially set out, which is the 40th ground of If Kelly did convey these lots or the mineral the motion. interests therein, with mining privileges, to two persons who dug this ditch in a company or jointly with him, or if he dug it alone, with the reservoir containing water fit for those mining purposes, ought not equity to estop him from cutting off the supply of water from that ditch and reservoir? But it has been held by us that in our judgment, on the facts, the three dug it together under the charter, and the title is in the company; therefore this charge, if erroneous, does not affect the real merit of the case.

In respect to the charter naming Easterling, and not Eastman, as a co-corporator with Kelly, it is enough to say that Kelly recognized Eastman as the man meant in the charter, and so treated him, and got his money for joint enterprises touching the charter, and that the Dahlonega company hold under Kelly.

of title after use of the water and during tenancy under the Battle Branch company, and in so far as that ground excepts to the application of estoppel to denial of title under that state of facts, it is apparent from what we have already said that we see no error in it. The charge excepted to, however, goes further, and lays down a rule to measure the damages of the complainant, conceding that it has made good its title; and that rule, as well as the

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tion, whether the evidence and law of the case touchlamages sustain the verdict, will now be considered. The measure of damages prescribed by the court in the green excepted to is as follows: "If you should believe the ditch and the water flowing therein is the propof complainants, and that defendants have diverted water and used it themselves, to the damage of comlants and without their consent, then the complainwould be entitled to recover for damages such amount the use of the water is shown to have been worth for time it has been used by defendants after the withal of complainant's consent." Is this rule the law of case?

one has the use of another's property for nothing called for by the owner, and when called for refuses re it up, it would seem a sound principle that to meashe damage of the owner, what the borrower made by ise would be a fair criterion; but if the property itself been largely enhanced in value by the borrower with assent of the lender, not only in repairing, but in ng extensive and costly additions to the corpus, ought hat to enter into the true measure of damages to the er? He not only gets back his own in better repair when he loaned it, but of double capacity. Nay, the loan was of advantage to him in the case at bar, as Sattle Branch company thought it better to have water e ditch than have it dry, and the work of the Dahca company opened it to a large extent where filled up, to flow the water. Besides, the evidence shows that omplainant had received favors itself from defendant, the loan of the water was not exactly a gratuity, but inted to a guid pro quo. In addition to all this, the city of the ditch was doubled, by opening for the first other streams of water into the Kelly ditch.

t it be borne in mind that the inquiry is, what damdid the complainant receive. How much was it inis it not enough that the defendant doubled the Imboden et al. 12. The Etowah and Battle Branch, etc., Mining Company.

capacity of the ditch, and thereby doubled its value either for use or rental; and shall it pay more?

Besides, where could complainant have used the water from the time it demanded restoration of it up to the trial? It was not ready to use it on mines of its own. When would it get ready? There is no proof that it had made, or tried to make, preparations to mine on its own lots. Where could it have rented the water? To what other company? There is no evidence in this record of any customer it had or could have got.

Moreover, the defendant rented the water on the other side of the Etowah river, and in order to do it carried it across the river by pipes, at the expense of thousands of dollars. Is it to pay for all the water carried there at full price, with no deduction for the expenditure in conveying it? The evidence does not show how much, if any, it used on the side of the river where the reservoir of complainant was, nor how much it rented on the other side after, and by reason of, that heavy expenditure; yet the charge was construed to authorize, and the verdict found defendant liable for all the water, without allowing it any equitable setoff at all.

We consider, therefore, the charge, as construed and applied by the jury, erroneous and the verdict wrong. On the point of damages, too, it is confused. It is for two years' use, and yet for 560 days. Deducting Sabbath days, and yet the remainder of two years is not 560 days. Even at 12 cents per day for 560 days, the verdict is inaccurate. It should be \$6,720.00, and not \$6,700.00.

True, the defendant cannot complain of its being less than it ought to have been by twenty dollars, as it makes that much by the error; but the difference in time of the finding and the inaccuracy of the calculation of amount on either the two years or the 560 days, show a want of careful consideration of the case. And this, added to the stronger reasons of the failure of the judge to guard the jury in respect to those elements of this case which would

# Savannah, Florida and Western Railway re Harper et ux.

make the naked measure of damages he laid down unfair, and of the fact that the verdict as found is unsupported by evidence of damage to the extent found, on any equitable rule, requires that it be set aside and a new trial had, unless the complainant write off the damages. The only evidence touching damages in the record is that there was one hundred inches or one hundred and twenty-five inches of water in the ditch, and that the customary rate of rental along the line and from the reservoir was 12 cents per inch per day. There is not a particle of evidence that complainant could have used it or rented it to a person upon earth, natural or artificial, at that or any price, and that therefore it was worth that money to it.

It is therefore ordered that a new trial be granted, unless the complainant below, the defendant in error here, shall write off the damages; in that event let the verdict as to the right of property, the restoration of the water, and the perpetual injunction stand, and the decree be modified accordingly.

In either event, the defendants in error must pay the costs of bringing the case to this court, as plaintiff in error was constrained to sue out this writ of error in order to have the damages set aside.

Judgment accordingly.

# SAVANNAH, FLORIDA AND WESTERN RAILWAY vs. HAR-PER et ux.

### [This case was argued at the last term, and the decision reserved.]

- 1. Where it appears that counsel was aware of the existence of testimony before the trial, but caused a subpœna to be issued for the witness desired under an erroneous name, and there is no explanation as to how the mistake occurred, and the evidence, if procured, would be merely cumulative, a new trial will not be granted on the ground of newly discovered evidence.
- (a.) Besides, the character of the newly discovered witness was impeached by the affidavits of two persons, and although it was sustained by the affidavit of one person. doubt was cast upon its credibility.

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2. Where general damages have been recovered for a personal tort, if they are so excessive as to lead the court to suspect bias or prejudice, he may grant a new trial; but the judge has no power to say that the verdict in such a case should not exceed a specified sum, and to require the plaintiff to write off a portion of the damages, and thereupon refuse a new trial. Aliter, in actions on contracts or for torts to property, the value of which may be ascertained, and in relation to which fixed rules for measuring damages are recognized.

May 1, 1888.

New Trial. Damages. Practice in Superior Court. Verdict. Before Judge Tompkins. Bryan Superior Court. May Term, 1882.

To the report contained in the decision it is necessary to add only that Harper and wife brought suit against the Savannah, Florida and Western Railway to recover damages for a personal injury to the latter, alleged to have been caused by the negligent running of a train on said railway. On the trial, the jury found for the plaintiffs \$6,000.00. A motion was made for new trial and the judge passed the following order:

"After argument upon the original and amended motions for a new trial, and after considering all the facts and circumstances of the case, it is considered, ordered and adjudged that the motion for new trial be granted, unless the plaintiffs shall within five days write off from said verdict of \$6,000 the sum of \$2,000, leaving the verdict to stand as if originally given for \$4,000; and, in event said verdict shall be so written off, then the new trial is refused and denied."

The plaintiffs accepted the terms of the order, and wrote off the amount required thereby. Defendant excepted.

CHISOLM & ERWIN, for plaintiff in error.

WILLIAM CLIFTON; LESTER & RAVENEL, for defendants.

HALL, Justice.

The verdict was for six thousand dollars. The defendant below and plaintiff in error moved for a new trial upon these grounds:

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- (1.) That said verdict is contrary to law.
- (2.) That it is contrary to the evidence.
- (3.) That it is strongly and decidedly against the weight of evidence and the principles of justice and equity.
  - (4.) That it is without evidence to support it.
  - (5.) That it is excessive.

This motion was amended because of newly discovered evidence.

At the hearing, the judge ordered a new trial, unless the plaintiffs would within five days write off from said verdict the sum of two thousand dollars, leaving it to stand as if originally given for four thousand dollars; in which event the motion for a new trial was denied and refused. Within the time prescribed, the plaintiffs wrote off from the verdict two thousand dollars, and the new trial was thereupon refused. The errors assigned by the bill of exceptions are:

- (1.) The refusal to grant the motion for a new trial.
- (2.) In not granting the same without terms or conditions.
- (3.) In not granting the same unconditionally, as prayed for, upon each and all the grounds of the motion and the amendments thereto.
- 1. We will first dispose of the amended motion. The new trial should have been refused upon the ground therein set forth. The newly discovered evidence was merely cumulative. No diligence was shown to procure it, and no satisfactory reason is assigned for the want of such diligence. It does not appear from the affidavits filed in its support when and how it was discovered, and therefore, whether the evidence in question was in fact newly discovered. On the contrary, it appears that defendant's counsel had a subpoena issued for a person supposed to be the witness in question, but by the wrong name, and was unable in consequence to have him served, and that he did not discover the mistake until some time after the trial was had. He knew of the evidence before the trial, but was mistaken as to the name of the witness

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by whom the facts could be proved. How the mistake occurred, and how far the defendant was at fault in not detecting it earlier, does not appear. Code, §3716, and cases cited thereunder.

Besides, the character of the witness, Dizor, by whom this new proof was to be made, was impeached by the affidavit of two persons, and although it was sustained by the affidavit of a single person, doubt was thereby cast upon his credibility. 57 Ga., 329, (5.)

2. It is evident from the order overruling the motion for a new trial, that the presiding judge was dissatisfied with the finding of the jury, so far at least as respects the amount of damages found; that he considered this finding so excessive as to justify the inference of undue bias upon the part of the jury; or if not that, he had reason "to suspect bias or prejudice in them;" and that, if he had not thought he had the power of remitting a portion of these damages, he would have set aside the verdict and granted a new trial upon this ground.

That he had the power to grant the new trial because the general damages or "such as the law presumes to flow from any tortious act, and which may be recovered without proof of any amount," (Code, §3070), was so excessive as to lead him to suspect bias or prejudice, is clear. Code, \$\$3067, 2947, and authorities there cited. But that he is authorized to fix the amount which the jury should have found may, under our decisions, and indeed under the express provisions of our Code, be well questioned. language of the first of the above cited sections of the Code (3067), which prescribes the measure of damage where the entire injury is to the peace, happiness or feelings of the party, is that the "verdict of the jury should not be disturbed, unless the court should suspect bias or prejudice from its excess or inadequacy;" the language of the other section (2947) is still more explicit and imperative. "The question of damages being one for the jury, the court should not interfere, unless the damages Savannah, Florida and Western Railway vs. Harper et uz.

are either so small or excessive as to justify the inference of gross mistake or undue bias." The existence of either one or the other of these must have been suspected or inferred, else there could have been no interference with the verdict. This was a matter in the sound discretion of the court, and we cannot say, from any thing that appears in this record, that the discretion was abused in setting aside the verdict, and ordering a new trial. This had, prior to the adoption of the Code, been the course sanctioned by this court in several instances, and in quite a number of others since that time. In Lang et al. vs. Hopkins, 10 Ga., 45, Lumpkin, judge, delivering the opinion, declares, excessive damages to be "good cause for granting a new trial, and that the discretion of courts may be properly exercised in this respect in two cases: One where the law recognizes some fixed rules and principles in measuring the damages, whence it may be known that there is error in the verdict, as in actions on contracts or for torts done to property, the value of which may be ascertained by evidence. The other includes suits for personal injuries, where although there is no fixed criterion for assessing damages, yet the court must conclude, from the exorbitancy of them, that the jury acted from passion, partiality or corruption." This case furnishes the text of the last section of the Code above cited, and that includes both classes of cases in which damages may be given, and prescribes the grounds upon which the court may rightfully interfere with the verdict, in the first class of cases, where there has been gross mistake, and in the second, where the finding has been so excessive as to justify the inference of undue bias. first instance named, it is an easy matter to correct any excess in the verdict by directing a portion of the same to be written off, for there the law recognizes fixed rules and principles for measuring the damages, and the evidence accurately ascertains what amount should be found. But

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in the last, from the very nature of the case, it is impossible to lay down any such fixed rules and principles; and in every such case the amount of the finding must be largely in the power of the jury, who have no other guide but their enlightened consciences. To say, therefore, in such cases that this finding should not have exceeded a certain sum, is to invade their peculiar province, and to assume their functions; and to require a portion of the amount so found by them to be remitted, and the balance to stand as their verdict, seems to us unauthorized either by the words of the law, or by the precedents and practice in such cases.

There had been a finding of two thousand dollars in Duffield vs. Tobin, 20 Ga., 428, which was an action of slander. and the court below set aside the verdict and ordered a new trial unconditionally. Although he was of opinion, from the rank and condition of the parties in life, that a verdict for a larger sum than five hundred dollars was excessive, yet he did not make the relinquishment of the excess beyond that amount the condition upon which the verdict should stand, and that decision was approved by this court, for the reason that the question, whether the damages found by the jury are excessive, is for the discretion of the court. In Atkins vs. Williams, 23 Ga., 222, which was another action for slander, this court, in reply to the objection that the damages were excessive, seemed to consider that they might be heavy, but inasmuch as the court below trying the case which "must ever receive more light on the question of excessive damages than it could impart to any other court," was satisfied with the finding, it was allowed to stand; there was not enough disclosed to this court to satisfy it they were excessive; and for the further reason that "the boundaries for the amount of damages in cases of this kind were anything but fixed." In Coleman vs Southwick, 9 Johns. R., 45, Kent, Chief Justice, says: "The damages must be flagrantly outrageous or extravagant or the court cannot undertake to draw the line; for they have no standard by which to ascertain the excess."

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So in Hewlett vs. Cruchley, 5 Taunt., 281, Mansfield. Chief Justice, said it was "well acknowledged in all the courts of Westminster Hall, that whether in actions for criminal conversation, malicious prosecution, words, or any other matter if the damages are clearly too large, the court will send the inquiry to another jury." In the following cases for personal torts, where verdicts were set aside for excessive damages, all, without exception, were sent before another jury. McConnell vs. Hampton, 12 Johns., 234; Chambers vs. Robinson, 1 Strange, 691; Price vs. Severn, 7 Bing., 316; Nettle vs. Harrison, 2 McCord. 230. In no similar case has this court, in granting a new trial, ever annexed thereto a condition which would prevent another jury from passing upon the right to recover damages, or upon the amount to be found. 58 Ga. 107. 111: 59 Ga., 426. The question is a peculiar one to be decided by the jury. 54 Ga., 224.

The case of The Atlanta and West Point Railroad vs Venable, 67 Ga., 697, forms no exception to this remark. It was a suit at the instance of a minor child for the homicide of her mother by the railroad train. The jury, under the instructions of the judge, gave damages for the support of the plaintiff, not from the death of the mother, but from the accident which resulted in her death, and which occurred more than a year afterwards. A majority of the court were of opinion that the plaintiff was entitled to no support for the period intervening between the accident and the death, and having the dates of these respective events, the age of the plaintiff, and what the jury estimated as sufficient for support during the entire time, it was easy to ascertain the amount that ought to be deducted for the time when no support should be allowed. This having been done, a new trial was ordered, unless that amount was written off. This was the simple correction of a mistake, brought about by the error in the judge's charge, and did not interfere with any of the rights or privileges of the jury in fixing the amount of Jamages; it only carried out what it was reasonable to sup-

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pose would have been their finding under proper instructions. Besides, this court, by express provision of law, has power over this subject that is not conferred upon the judges of the superior court. Code, §§ 218, par. 2, 4284. The verdict, under this power, may be reduced, but cannot be increased. 29 Ga., 203.

Against this unbroken array of authorities, which might be greatly extended, we find nothing save a case or so in the later New York decisions, which give most excellent reasons against the conclusion they have reached, especially 19 Barb., 461, and a case in 3 Mason 102, for a malicious arrest, in which Judge Story, with many misgivings and not without serious doubt, ordered a new trial, unless the plaintiff was willing to remit \$500 of the \$2,000 found. But it would seem that this learned judge did not continue to hold that opinion, for in a much less flagrant case than that just referred to, he, in the exercise of his discretion, set aside the verdict, and ordered a new trial without condition or qualification, 3 Story's R., 1. In another case, 2 Ib., 670, 671, he thus lays down the rule: "In no case will the court ask itself whether, if it had been substituted instead of the jury, it would have given precisely the same damages; but the court will simply consider whether the verdict is fair and reasonable, and in the exercise of a sound discretion, under all the circumstances of the case, it will be deemed so, unless the verdict is so excessive or outrageous with reference to those circumstances as to demonstrate that the jury have acted against the rules of law or have suffered their passions, their prejudices, or their perverse disregard of justice to mislead them." In Dublin vs. Murphy, 3 Sanford R., 19, the superior court of New York, deeming the finding in the case of a personal injury excessive, ordered a new trial unless a part of the damages was remitted. The judge delivering the opinion stated that the " practice was very common in actions upon contract, where the party has recovered more than he is entitled

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to." "The only doubt," he says, "is whether in actions of tort (this was an injury to the person) the court can adopt the same practice. We can see," he continues, "ne objection to it in principle, and it will often relieve the parties from the expense and delay of a new trial. find this has been done in an action of trover in the courts of South Carolina. (2 Rich. R., 507; and see 1 Howard Miss. R., 19)." We, however, perceive strong objections to this course upon principle and upon authority: the analogy upon which this reasoning proceeds, if it has an existence at all, is very remote. It confounds the different classes of cases in which verdicts may be set aside either for small or excessive damages, and wholly ignores the distinction between them. In cases of damage for breach of contract or injuries to personal property, the evidence furnishes facts from which the damages may be accurately ascertained, while in cases of personal torts no such rule can be deduced from the testimony. In this latter class of cases, as we have seen, the damages are such as the law presumes to flow from the tortious act, and may be recovered without proof of any amount; and no measure can be prescribed except the enlightened conscience of impartial This case derives no support from Boyd vs. inrors. Brown, 17 Pick., 453, cited by the judge, which rightly held that the court trying had control of the matter. The damage being considered excessive, a new trial was ordered for the assessment of damages only.

The decision does not, we think, show, as was asserted by the superior court of New York, "that the court may give the plaintiff the option to reduce his verdict to an amount which the court would not have deemed unreasonable or excessive," but directly the contrary. The right of the jury to assess the damage was accorded in one case, while in the other it was denied. The power to control does not include the power to find. Like the executive veto, it arrests, but does not, by its exercise, bestow the power to enact. If the court in such a case may reduce

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excessive damages, why may it not grant a new trial where the damages found are wholly inadequate, unless the defendant will agree to increase them to an amount that the presiding judge, in the exercise of his discretion, may deem reasonable and proper? Our researches have brought to light only a single case in which it was claimed that such a course has been considered proper; but an examination of the case referred to-Armitage vs. Halev. 4 Adol. & Ellis, 917 (45 Eng. Com. L. R.)—does not sustain the practice, as it was by the court asserted to have done in 12 Barb. R., 501. The case was for a tort to the person; the jury found one farthing damages. Dundas, for the plaintiff, obtained a rule to show cause why a new trial should not be had, unless the defendant would consent to the damages being increased to £10, 5s. and 6d., the alleged amount of the surgeon's bill. The argument of the counsel showing cause against the rule, was interrupted by Lord Denman, C. J., with the remark that "a new trial on a mere difference of opinion as to amount may not be grantable; but here are no damages at all," and the counsel for the movant were stopped by the court and a new trial was awarded upon the payment of costs. It will be remarked that there was no attempt here to interfere with general damages as defined and distinguished by our Code, from special damages; that the whole effort was to obtain damages for an amount which was capable of being ascertained by exact computation, and not such as the law presumes will flow from the tort, and cannot be the subject of proof. Besides, the plaintiff in this case made the proposition to settle upon the terms mentioned, and it was for the defendant to accept or reject the offer; whereas, in our case, the motion for a new trial without any proposition for terms of settlement; in that case the terms emanated from the parties, in ours, they were imposed by the judge, regardless of the views or wishes of the parties. An option was given the plaintiffs to accept or reject, but none was given to the defendant

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The defendant made no such offer, and when imposed by the order of the court, excepted to the condition.

There are cases in England and in Massachusetts, in which verdicts in actions for injuries to property have been set aside upon the ground of excessive or inadequate damages, and that question alone sent to another jury to assess the damages correctly, the remainder of the finding being allowed to stand. 12 Peck., 279, 288; 17 Ib., 453, 461; 4 Taunt., 555. But it is believed that no case can be found where the circumstances of the entire transaction, as in this case, must be considered in determining the amount of the damages, where, upon the verdict being set aside on the ground of the excess or inadequacy of the damages found, and a new trial ordered, the reassessment of damages was the only issue to be submitted to the jury and they were prohibited from passing upon any other question. Such a course would withhold from the jury the means of effecting the very thing they are required to In this very case one of the issues raised was, that the plaintiff's negligence caused the injury of which she complained, or if it did not, then her own conduct contributed to it in such manner as to reduce the damages she might be entitled to recover. As suggested in the case from the 3 Sanford's R., the course pursued here might be desirable, because it would often relieve the parties from the expense and delay of a new trial. answer to such a suggestion is that neither the venerable sages of the common law nor the wisdom of the legislature deemed it prudent or safe to confide this power to the judge. Without such authority, he has no jurisdiction or power to pass upon or determine questions which the law refers to the enlightened conscience of impartal jurors, and with which he is forbidden to interfere, except where the finding leads him to suspect, or authorizes him to infer, that the verdict is the result of undue bias or prejudice. We are not to consider what would be more convenient or economical than the course marked out by the express

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provisions of the law in determining such question, nor do we design to suggest that the course of the court below was influenced by such considerations, however laudable they may be.

We cannot say that there was error in the refusal of the court to grant the new trial upon the other grounds taken in the motion, and although the questions of law growing out of the facts of the case have been elaborately and ably argued, we express no opinion upon them. The charge of the judge is not set out in the record, and as no exceptions have been taken to it by either party, we are to presume that it laid down the law correctly. Therefore, we direct that the judgment ordering the new trial be so modified as to eliminate therefrom the condition upon which it was granted, and that the relinquishment of the plaintiff made in pursuance thereof be annulled.

Judgment reversed.

# Goss vs. Greenaway et al.

- 1. While lapse of time between the death of a husband and the application by his widow for a year's support, during which time she lived upon the land and made use of the personalty of her deceased husband, may furnish a good ground to defeat the application before the ordinary, yet when the final judgment of that court has been rendered in the case, it is too late to attack it, especially before another court, except for causes apparent upon the face of the record, showing a want of jurisdiction either of the person or subject-matter.
- 2. Where a widow applies for a year's support out of the estate of her deceased husband, notice should be given to the representative of the estate, if there be one; if there be none, no notice is necessary. Creditors may protect themselves by having an administration, or by objecting to the allowance within six months after the return of the appraisers. If they fail to do so, the return will be recorded, and title will vest in the beneficiaries.

March 13, 1883.

Year's Support. Judgments. Notice. Before Judge Brown. Fannin Superior Court. October Term, 1882. Goss vs. Greenaway et al.

Reported in the decision.

WIER BOYD; C. D. PHILIPS; J. A. JERVIS; O. R. DUPree, for plaintiff in error.

THOMAS F. GREER, for defendants.

CRAWFORD, Justice.

A fi. fa. in favor of the plaintiff in error vs. W. F. Greenaway, was levied upon certain land, which was claimed by the widow of the said Greenaway as having been set apart to her by a judgment of the court of ordinary as a part of her year's support, out of the estate of her deceased husband. On the trial, the jury found the land not subject, and the plaintiff in fi. fa. moved for a new trial, which was overruled by the judge, and this decision is alleged as error.

1. The grounds of the motion for a new trial were, that the verdict was contrary to law, and contrary to the charge of the court.

Whilst it is not set forth in what way the verdict is contrary to law, yet the argument discloses the ground to be that, as the husband died in 1877, and the application for a year's support was not made until 1881, the widow meanwhile living upon the land, and upon whatsoever of personalty there may have been left at the death of the husband, that she was, therefore, not entitled to any further allowance.

This question was before us in the case of Tabb vs. Collier, February term, 1882,\* and it was then held, that whilst this might be a good ground to defeat the application before the ordinary, yet, when the final judgment of that court had been rendered in the case, it was too late to attack it, and especially before another court, except for causes apparent upon the face of the record, which showed a want of jurisdiction, either of person or subject-matter. In that case, ten years had elapsed before the year's sup-

<sup>\* 68</sup> Ga , 641.

#### Goss vs. Greenaway et al.

port was set apart. It will also be seen, by an examination of the record in the case of *Miller vs. Defoor*, 50 Ga., 566, that the year's support was allowed, after the family had lived nearly twelve years on the land set apart to them, after the death of the husband and father.

The cases cited in 34 Ga., 418, and 36 Ib., 194, were cases where objections were filed to the allowance, before the ordinary, and then carried by appeal to the superior court. That was the proper place and the right time to file objections and have the rights of the parties settled. But in the case at bar, there was a judgment of the court of ordinary at a regular term thereof, setting apart this property, and it is sought now to attack it, and have it set aside in the trial of this claim case, upon grounds which should have been made by filing objections thereto, as provided by law.

2. It is further said that the verdict is contrary to the charge of the court. In what respect it is so, is not specifically stated, though taking the portion of the charge set out, it seems to be claimed that there was a want of proper notice, or a failure in the recital thereof in the judgment rendered, and that this defect is shown by the exemplification of the record offered in evidence.

But we see no legal ground for complaint of the jury on this account. By section 2571 of the Code, it is provided that, among the necessary expenses of administration, and to be preferred before all other debts, is the provision for the support of the family for the space of twelve months; and this is to be set apart upon the application of the widow, or that of the guardian of the children, or any other person in their behalf, on notice to the representative of the estate, if there be one; and if none, then without notice. That this is anomalous, in that it affects the rights of parties interested in the estate without giving them direct notice, must be admitted, but being statutory, it is controlling. It is, however, to be remembered that to require the wife to know, and serve notice on the creditors of the

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husband, would be not only a burden, but oftentimes an impossibility. Moreover, it is provided that creditors may always move in the matter of administration upon the estates of their debtors, and either secure it to one of their number, or force some one of the heirs to accept it, and thereby protect their interest so far as it may be affected by the year's allowance. Not only so, but in all cases, the law allows six months after the appraisement and schedule have been returned to the office of the ordinary, for any person interested to file objections; and if none be filed, then the title to the property vests in the beneficiaries. creditors fail to look after their interests until such title, by the judgment of the court of ordinary, is vested in the family of the deceased, and they thereby lose their rights therein, it is owing to their own want of diligence, and not to any defect in the law.

In so far as the recitals of notice in the judgment of the court are concerned, it is only necessary to say that, under the facts set out in the application by the widow for the year's support, as shown by the exemplification, there was no necessity for such in this case, there being no representative of the estate. Where there is none, the appraisers are appointed without notice to any one; they act under their oaths, make their return, and to which return creditors and others interested may file objections, either then, or at any time within six months therefrom. If none are filed, and the judgment of approval by the ordinary is rendered, it is final.

Judgment affirmed.

# DOYAL vs. THE STATE OF GEORGIA.

# [This case was brought forward from the last term under \$4271 (a) of the Code.]

- 1. Where a city policeman was slain, and the mayor and council employed counsel to prosecute the slayer, this was not alone sufficient to disqualify all grand and traverse jurors residing within the corporate limits from sitting in the case, on the ground that they would be liable to taxation to satisfy the attorneys' fees. Such interest, if it exists at all, is too minute and remote to furnish a ground for challenge.
- 2. A person over sixty years of age is not a qualified juror; and if the court is apprised of the fact in time, it is his duty to excuse such person. Although one summoned as a juror, and who is over sixty years of age, may not have offered any excuse before the jury was impanelled, yet if, when his name was called in its order on the panel, he made known his age and desired to be excused, there was no error in so doing, although the defendant may have exhausted all his challenges but one in order to secure such person on the jury.
- 3. The provisions of the Code respecting the mode and terms of entering a nolle prosequi in criminal cases are directory and for the protection of the problic; a departure from them furnishes no ground of defence to the defendant when arraigned under a subsequent indictment, except when a nolle prosequi has been entered without his consent after the case has been submitted to a jury. In that case, he has been once in jeopardy, and cannot be so placed again. But there is no such plea to an indictment as pendency of a former indictment or autre fois arraign.
- (a.) The act of 1870 is improperly codified with §4649 of the Code of 1873.
- 4. Where one present at the scene of a homicide, in connection therewith, motioned toward the slayer with a stick, as if indicating flight, and the latter did flee, the person making the motion being in front of the slayer, who was in a situation to have seen him, evidence thereof was admissible.
- A general character for violence cannot be established by proof of specific acts.
- (a.) A defendant charged with murder can introduce proof that the deceased was a person of violent and turbulent character, only where it is shown prima facie that the prisoner had been assailed and was honestly seeking to defend himself.
- (b.) The evidence being illegal, the court should not have allowed the defendant's counsel to state in the presence of the jury, for any purpose, what he expected to prove in relation to this matter.

- 6. When taken in connection with preceding explanations of the various grades of manslaughter and of self-defence, contained in the charge, the following charge was substantially correct: "If they found from the evidence that defendant and deceased met, and a rencontre ensued, in which defendant drew a deadly weapon and killed deceased, then whether the defendant was guilty of murder or manslaughter would depend upon their finding of the fact whether the killing was done with malice aforethought or not. If done with malice aforethought, it was murder, if not, it was manslaughter."
- 7. Nor, when taken in connection with other portions of the charge, was there any error in the following charge: "Before the defendant would be excused, under the law, for killing the deceased, it must appear from the evidence that at the time of the killing the danger was so urgent and pressing, the killing was absolutely necessary to save defendant's life."
- 8. That pending the selection of a jury in a criminal case, a portion of them already selected were placed in the court room with a bailiff, and an outsider came into the room, addressed one or two idle remarks to members of the jury, and on being informed of the impropriety of his presence, at once withdrew, will not necessitate a new trial, it appearing that nothing was said or done relevant to the case or which had any effect thereon.
- 9. That a bailiff slept in the room with the jury up to the time of the charge of the court, will not require a new trial, where it appeared that he neither conversed with them, nor they conversed among themselves in his presence or hearing about the case.
- (a.) The affidavits show that the jury did not separate and were not out of the bailiff's presence during meal times, and that they saw no one else except the waiters who furnished their meals.
- 10. Where a defendant in a criminal case was aware of the presence of a witness during a conversation, and took no steps to secure his testimony at the trial, though he was accessible, a discovery after the trial of what such person would testify as to the conversation, is not newly discovered evidence such as will furnish a ground for new trial.
- (a.) The other newly discovered evidence, if competent at all, would only be admissible to impeach a witness sworn on the trial; and such testimony furnishes no ground for a new trial.
- 11. The verdict is supported by the evidence.

March 13, 1883.

Criminal Law. Practice in Superior Court. Jury. Evidence. Before Judge Stewart. Spalding Superior Court. February Adjourned Term, 1882.

Alfred B. Doyal was indicted for the murder of M. A. Hancock. On the trial, the evidence for the state was, in brief, as follows:

Hancock was a policeman in the city of Griffin. Between him and Doyal hostile feelings had existed for some time before the homicide. A week before that occurrence. Hancock had arrested and imprisoned Doyal on the charge of being drunk on the streets. Doyal felt much aggrieved at his treatment, and after being released, complained thereof, and on several occasions threatened that he would kill Hancock. On April 23, 1881, Hancock was standing on the street. He was not at the time on duty as a policeman, nor did he have on his uniform, nor had he the usual weapons that he carried while on duty. Doyal stepped up to him and said that he was ready to settle "this matter." Hancock responded, "Alf, that's all right," Doyal had one hand in his pocket and was gesticulating with the other. He said, "God damn you, I will make it all right," and fired upon Hancock. The latter placed his hands upon his bowels and said, "Alf, you have killed me." The answer was, "God damn you, you can have it again," and Doval fired a second time. Hancock turned and went to a drug store near by, and as he entered he said to the druggist, "Doctor, I am shot. Pray for me." He was laid upon the floor where he died in a few minutes. After firing the second shot, Doyal crossed the street waving his pistol and saying that he would kill the next man who came on, or making use of some similar expres-Some one said, "Alf, you had better run;" and one Johnson, who was in the street in front of Doyal, motioned with a stick. Thereupon Doval began to run. and a crowd began to pursue him. After running some distance he stopped, and when the sheriff came up, under order of the latter, he put down the pistol and surrendered himself. He stated that he had four shots yet left in his pistol, and he could kill a man with each one of them, but he did not want to kill anybody but his enemies. Some one

stated that Hancock was thought to be dead. Doyal said. "I hope he is. If he is not, I would like to finish it;" also, that he had said he would kill Hancock before Saturday or Sunday night, and he thought he had done it; that he would be willing to hang if he could get another man; that he did not shoot to miss, but knew where he aimed; that he could be blindfolded and go in the dark and put his finger in the bullet hole where he intended to hit when he aimed and shot; that the second shot did not miss, but went either through Hancock's coat or his coat sleeve. No weapons were found on the person of the deceased. Before the homicide some one told Hancock of the threats which Doyal had made concerning him, and a fellow policeman advised him to be careful. He replied that he did not desire any advice, and that if Doyal fooled with him he would kill him. Shortly before the homicide, Doval obtained from a bar-room near the scene of its occurrence a pistol which he had frequently borrowed before, and two or three minutes before the shooting, as he passed down the street, he was heard to use the words, "I will get him."

The evidence on behalf of the defendant was, in brief, as follows: Hancock was a dangerous man. When drinking he was violent and turbulent, but when sober was peaceable. His feelings towards Doyal had been for some time very hostile. A week previous to the shooting, he had locked Doyal in the calaboose, and three or four days before, upon Doyal's speaking to him, he had cursed and abused him, and stated that he would kill him if he (Doval) spoke to him again. Just before the killing and near the scene thereof, Doyal had a conversation with one or two people. Just after he left, Hancock came down and asked what Doyal was talking about. The person addressed replied that it was about a well. Hancock responded, "You know well, he was talking about me." While he was standing there. Doval came out of a saloon and started across the street. Hancock called him and

went towards him. He said that Doval must take back something that he had said; that he (Hancock) was not then on duty, and it would be man and man. Doyal declined to retract, and started away, Hancock following and saving that it had to be settled. Doyal made some response, and then stopping told Hancock to let him alone. The latter insisted upon a retraction of what had been said. and Doval declined. Hancock dropped his hand under his coat on or near his hip pocket. Doyal stepped back one or two paces and drew his pistol, Hancock advancing about the same distance. Doval fired the first shot, and Hancock placed his hands upon his stomach. Doyal then fired the second shot and Hancock turned and went towards the drug store. Johnson, the person who the state's evidence indicated had motioned with a stick to Doval, denied that he did so, but said that he was much excited and might have waved the stick in the air; that he had taken three drinks, but was not drunk. The city council of Griffin appropriated \$200.00 to pay counsel fees in the prosecution of the case. Four days before the difficulty. Hancock had a pistol oiled at a shop. He stated that he was going to kill some damned rascal, and that the shopkeeper would hear what would happen pretty soon.

There was much other testimony in relation to the character of Hancock and tending to impeach witnesses, which is not material here.

The statement of defendant detailed the circumstances stated in the evidence on his behalf; denied making any threats; asserted the violent character of Hancock, and that insults and wrong had been done by him to defendant; that he obtained the pistol from the bar-room for a gentleman who wished to borrow it; that the difficulty happened substantially as stated in the evidence on his behalf; that Hancock was advancing with his hand upon his pocket when defendant fired, and that upon Hancock's ceasing to advance, defendant turned his pistol so as not to strike him with the second shot; that he was excited, and when the

ame towards him in the alley, he started off, but and voluntarily surrendered himself.

ury found the defendant guilty. He moved for a al on various grounds, all of which are sufficiently a the divisions of the decision where they are disexcept the following:

(11.) Because the court refused to allow defendunsel to prove specific acts of violence, cruelty or nce of deceased, in order to illustrate his character; ause the court, on objection of counsel for the state, to allow defendant's counsel to recite these acts resence of the jury.

Because Wyley Patrick, the father of the mayor in (who took an active part in the prosecution) to the room where the jury were, and talked with he jurors apart from his fellows. [The affidavits d on the hearing showed that on the first day the djourned before the jury was completed. tho had been selected were left in the court room. came into the court room and inquired if court ourned. Receiving no answer, he sat down on a ome thirty feet from the jury. He then went up of the jurors and asked, "How are our women on?" He was then informed that he must leave n, and did so, stating that he did not know that it y harm to come in. He was intoxicated at the The verdict was in no way affected by his presence.] (20.) Because of newly discovered evidence. [The f the newly discovered evidence was to impeach es on the trial, and two of the newly discovered es were desired to testify to a conversation between endant, themselves and another. Defendant knew ey were present, but did not know what their testi-

rould be until after the trial.]

Because the jury were allowed to separate after had been submitted to them. [It appeared from davits introduced, that the jury were carried to a 70-10

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saloon in the city to obtain their meals while the case was in progress. The saloon was divided into stalls, which were separated by plank partitions, but they did not reach to the ceiling, and the fronts of the stalls were open. The jury occupied two adjoining stalls, and a bailiff sat at a part of them where he could see into both. The front door of the restaurant was closed, and no one was allowed to enter except the waiters, and they did not enter the stalls.]

The motion was overruled, and the defendant excepted.

JAMES S. BOYNTON, for plaintiff in error.

C. Anderson, attorney general; E. Womack, solicitor general; F. D. Dismuke; J. J. Hunt; Charles R. Johnson, for the state.

HALL, Justice.

Alfred B. Doyal was tried for the offense of murder, at the February adjourned term, 1882, of Spalding superior court, and found guilty; whereupon he made a motion for a new trial, upon the various grounds therein set forth, which, after being heard and considered by the court below, was overruled and denied. To this judgment refusing the new trial exceptions were taken, and by writ of error brought to this court.

1. The first grounds of this motion which we shall consider, are those which relate to the disqualification of certain grand jurors who belonged to the panel that found the bill of indictment against the defendant. The mayor and council of Griffin had employed counsel to assist in this prosecution, Hancock, the party slain, being one of the police force of the city at the time he was killed. Some of the members of the city council were on the grand jury that found the first bill. This bill, on motion of the solicitor general, was, by order the court, quashed, and an

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order to that effect entered on the minutes. This order stated no ground upon which the indictment was quashed: a subsequent order, however, was taken, showing that it was quashed because certain named members of the city council who had employed counsel to prosecute, were of the panel of the grand jury that found the bill. Upon the panel that found the second bill, there were several jurors who resided in the corporate limits and who were Upon the trial, several residents of the city tax-pavers. were put upon the prisoner as jurors, and they, as well as the last named grand jurors, were all challenged as improper jurors, because of their liability to taxation to satisfy the claims of the attorneys employed by the city council to prosecute; in short, because they were from this fact necessarily interested in the prosecution, and were not omni exceptione majores. This cause of challenge was overruled by the court, and we think correctly. The alleged interest of these jurors was so minute and so extremely remote as to be imperceptible and almost inconceivable. This objection because of interest must necessarily have some limits. It is not every degree of interest that will disqualify; and hence it is matter of determination on many occasions as to what degree of interest will be sufficient to exclude one from the jury. It is plain that there might be some degree of remote interest in the subject-matter that ought not to be considered as rendering a person incompetent. 11 Ga., 207, 221; 29 Ibid., 105; 5 Mass. R., 90; 7 Vt., 169. In this case, it was not shown that the jurors had been called upon, nor was it suggested that they ever would be called upon to pay tax to aid in this prosecution; or, if called upon, that they would voluntarily respond, or could be compelled to respond. Even in a case where persons associated themselves together to prosecute offenders against certain laws. and became responsible for the expenses, according to the amount of their subscriptions, they were held competent jurors, if they had not paid in their subDoyal vs. The State of Georgia.

scriptions. 6 Gray, 343; cited Proffat on Jury Trial, §169.

2. When the jurors were called, and before they were empanelled and put upon the prisoner, the court inquired if any of them had excuses to offer why they should There was one Kinard on the jury who offered no excuse at that time, but remained on the panel put upon the prisoner until his name was reached and called he then stated to the court that he was over sixty years of age and desired to be excused; whereupon the court, of its own motion, granted his request. He was challenged by neither party, the state nor the prisoner. The prisoner alleges that he was an acceptable juror, and that he had exhausted all his challenges but one in order to reach him. facts he made known to the court, and protested against Kinard being excused; but notwithstanding this, the court held him incompetent to serve, and excused him. which ruling of the court the prisoner excepted.

That a person over sixty years of age is not a qualified juror is evident from the very words of the Code, §4681, par. 2 and it has been held that it is the duty of the court, if apprised of the fact in time, to excuse him. Cochron vs. The State, 20 Ga., 752, Buroughs vs. The State, 33 Ib., 403.

3. Upon being arraigned, the prisoner pleaded that there had been a former presentment in this case, in which a nolle prosequi had been entered at the instance of the solicitor general, and without his consent thereto, which he insisted relieved him from answering to the indictment or presentment on which he was then arraigned, and which had been found subsequently to that in which the nolle prosequi was entered. This plea was demurred to, and the demurrer sustained, and error is assigned thereon.

It is urged in argument that, under section 4649 of the Code of 1882, it was not proper for the court to allow the solicitor general to enter this *nolle prosequi*, except for some fatal defect in the bill of indictment, to be judged of by the court, in which case the presiding judge should

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order another bill of indictment to be forthwith submitted to the grand jury; or until an examination of the case had taken place in open court.

These provisions of the law are merely directory, and were intended to prevent an abuse of the power of entering a nolle prosequi by the solicitor general. They are improperly codified with what was section 4535 of the Code of 1863, and 4555 of the Code of 1868, which provided that no nolle prosequi should be entered after the case had been submitted to the jury, except by the con-This was evidently intended for sent of the defendant. the protection of parties accused of crime, and whenever their right to have a jury pass upon the case, after being submitted to them, has been violated, by causing a nolle prosequi to be entered without their consent, this court has invariably treated it as an acquittal. The cases to this effect are so numerous, and the principle they establish so plain, that it would be a waste of time and space to cite them. The solicitor general, by Irwin's Revision, \$415, had authority, on the terms prescribed by law, to enter a nolle prosequi on indictment. What those terms were is sufficiently indicated in the subsequent clause of that section, as also by the succeeding section. They related, as it appears, wholly to the payment of the costs that had accrued; for if he had directly or indirectly exacted in money or other valuable thing from the defendant or anybody else, more than his lawful cost, then it became a subject-matter for investigation by the grand jury; and if that body presented him for having received more than his lawful costs, then he was disqualified from further discharging his official duties until a trial could be had upon a bill of indictment, and if that trial resulted in his conviction, he was to be fined and imprisoned at the discretion of the court. This conviction was made a ground of impeachment, and the disqualification consequent upon this action was made to continue until the adjournment of the next session of the general assembly.

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Notwithstanding these stringent provisions, it seems that in the opinion of the general assembly the public was not sufficiently protected from this abuse of power by the solicitor general, and they accordingly passed an act approved October 28, 1870, and entitled "an act to repeal section 415 of Irwin's Revised Code, in relation to entering nolle prosequis," etc., by the first section of which it was enacted that no nolle prosequi should be allowed, except it be in open court, for some fatal defect in the bill of indictment to be judged of by the court, and if it was then allowed, the presiding judge should order another bill of indictment to be forthwith submitted to the grand jury." (Acts, 1870, p. 422.)

By some singular classification, this act was, by the codifiers of 1873, made a part of §4649 of the Code that year; but in 1877, the legislature passed another act upon this subject (Acts, p. 108), which, although it did not in express terms repeal the act of 1870, yet, as it seems to us, did so by necessary implication. This is entitled "an act to allow a nolle prosequi to be entered in criminal cases with the consent of the court"; and it enacts that "a nolle prosequi may be entered by the solicitor general in any criminal case, with the consent of the court, after an examination of the case in open court." This is the entire statute, except the usual repealing cause.

Notwithstanding this legislation, section 415 of Irwin's Revised Code appears in each subsequent edition of the Code precisely as it stands there. See Codes of 1873 and 1882, §380. How such distinct and dissimilar provisions as those which regulated the conduct of a court official, and such as were designed to protect the rights of persons accused of offences, could have been united in the same section of the Code, we do not understand. (See some timely and judicious observations upon this subject in the report of the Hon. Logan E. Bleckley, made in pursuance of an appointment by resolution of the general assembly,

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d December 11, 1882, to examine the Code of 1882, 8-10.)

now of no instance in which a defendant in a crime has ever been allowed in this state to avail himdeparture from the provisions of these acts respectentry of a nolle prosequi by the court or the soliciral, as a defence to an indictment, except in the entering the nolle prosequi without his consent cause has been submitted to a jury. This latter, g to our Code, puts him in "legal jeopardy," and vail him under that plea; but from the entry of a osegui under different circumstances, no such effect In a case where a jury was empanelled and sworn, state's counsel had read the bill of indictment and s opening remarks to the jury, but in which there arraignment and plea, the prisoner insisted could not be convicted on account of this , and was entitled to a verdict of acquittal, t below allowed a nolle prosequi to be entered, ained him until another indictment could be prend found; this court, upon writ of error, held re was no error in the proceeding; that the priss never in jeopardy. Harris, J., delivering the said: "We well know that, by the Code, a nolle cannot, without the consent of the accused, be on an indictment after a case has been submitted to but we decide that there can be no legal submisa jury until after arraignment and plea, or issue Hence, we can perceive no error in the circuit n allowing the solicitor general to enter a cosequi under the circumstances of this case. ere been an issue as the law requires in all cases, and one juror only empanelled and sworn, e would then have been submitted, and no osequi could then be entered as of right, but only consent of the accused. Then the jeopardy of sed begins, and not till then. Whenever a juror

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has been selected and sworn, the cause must proceed toverdict, unless one of those contingencies should occurprovided for by statute." Bryans vs. The State, 34 Ga.,. 323, 325.

That there is no such plea to an indictment as the pendency of a former indictment in the same case, or as autrefois arraign, we are well satisfied; indeed, this was expressly so ruled in the case of The King vs. Swain & Jeffreys, Foster's Crown Law, 104, 105, 106, citing 10 St. Tri. 36; Cro. Car., 147; 3 Bur., 1468.

4. The error alleged to have been committed by the court as set forth in 6th, 7th, 8th and 17th grounds of the motion for a new trial, consists in allowing the testimony of certain witnesses, over defendant's objection properly made, to the effect that Johnson, who was standing near when the killing took place, motioned toward defendant with a stick; in showing how the motion was made; that defendant was facing Johnson while he was making the motion, the witness not being able to state whether defendant saw the motion, and in remarking to counsel in the presence of the jury, in connection with this testimony: "You can prove anything that immediately followed, if connected with this transaction—anything said or done—anything stated to the defendant as part of the res gestæ."

Whether the facts testified, constitute any part of the transaction under investigation, it is not material to determine. The testimony was admissible, because the occurrence took place in the presence of the defendant, and he seems to have acted upon it. That he was in a situation to have seen what was done, and that it was done in connection with the killing, makes it competent. 65 Ga. 147. Every fact or circumstance shedding light upon the transaction should go to the jury, and especially such facts as show motive for the crime or the intent with which it was committed. 43 Ga., 484. The act admitted here was in the presence of the defendant and directed immediately towards him, and in that it differs from the case cited from

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53 Ga., 640. Besides, there was doubt in this case as to the participation of the defendant in the crime and as to the motives for their presence at the scene of the combat. For similar reasons the case cited by the able and indefatigable counsel for the plaintiff in error from 56 Ga., 274, is, unfortunately for his client, not more in point than that the statement of a witness to the disaster as to its cause, a short time after it occurred, made out of the presence of the defendant, was properly rejected. Besides, it was admissible as a warning to fly, and as part and parcel of the flight of the prisoner.

5. The 9th, 10th, 12th and 14th grounds of the motion for a new trial relate to the same subject, and may, therefore, be considered together. The defendant offered to prove by sundry witnesses specific acts of violence, turbulence and cruelty on the part of the deceased to his family and others, in order to show his desperate and dangerous character. He also offered to show his character for cruelty, and by a witness that, from what he knew of him. deceased was a turbulent and dangerous man. this testimony, upon objection being made, was rejected by the court. It has been ruled that general character for violence, etc., cannot be established by proof of specific Keener vs. The State, 18 Ga., 194: Pound vs. The State, 43 Ga., 128; Wharton's Cr. Ev., §68, and many cases cited in note 2.

The attorney general insists that "the true rule in such cases is, that the defendant can offer proof that deceased was a person of violent, turbulent and dangerous character only where it is shown, prima facie, that the prisoner had been assailed and was honestly seeking to defend himself"; and from a close and careful examination of the authorities, including the cases heretofore determined by this court, our conclusion is, that the limitation here contended for is neither unreasonable nor improper, but is in accord with the well-settled principles of the law in relation to self-defence. Dr. Wharton, in his able, accurate and

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learned treatise upon criminal evidence, §§69 to 84 inclusive, shows that this limitation is adopted wherever such evidence is held admissible, in more than twenty states of this Union, including Georgia, and perhaps, likewise in England. In section 69 of his work, he thus states the proposition: "The general principle, then, is this: not that it is lawful coolly to attack and kill a person of ferccious and bloodthirsty character; for it is as much murder in such manner to kill the most desperate of men as to kill the most inoffensive; but that, whenever it is shown that a person honestly and non-negligently believed himself attacked, it is admissible for him to put in evidence whatever could show the bona fides of his belief.

\* \* \* "He must first prove that he was attacked; and this ground being laid, it is legitimate for him to put in evidence whatever would show he had reason to believe such attack to be felonious." Note 1 to this section cites a great number of cases sustaining the text. This author, after reviewing the decisions of other states, says, (section 75): "In South Carolina, Georgia, Alabama, Kentucky, Tennessee and Mississippi, we have rulings to the same effect. In these states, the practice is to admit evidence of the deceased's character for ferocity, in all cases in which the defendant is shown to have been acting in self-defence." (See cases cited in note 1.)

In Bowles vs. The State, 58 Ala., 335, it was said that such evidence "is not receivable when there is nothing in the conduct of the deceased at the time of the killing which it illustrates." In Monroe vs. The State, 5 Ga., 137, Lumpkin, J., speaking for the court, says: "As a general rule, it is true that the slayer can derive no advantage from the character of the deceased for violence, provided the killing took place under circumstances that showed that he did not believe himself in danger." Again, in Keener's case, 18 Ga., 223, the same enlightened and humane judge quotes with approbation, and adopts the decision of the supreme court of Alabama, in Queensberry vs. The State, 3 Stewart and Por-

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ter, 308, in which it was said by Lipscombe, C. J., who delivered the opinion: "It is an acknowledged principle that if, at the time the deadly blow was inflicted, the person who inflicts has well-founded reasons to believe himself in imminent peril, without having by his fault produced the exigency, that such killing will not be murder." "If the killing took place under circumstances that could afford the slaver no reasonable grounds to believe himself in peril, he could derive no advantage from the general character of the deceased for turbulence and revenge." In Haynes' case, 17 Ga., 484, Lumpkin, J., again says: "It has been well said and settled, however, that before the law of necessity can exist, a case of necessity must exist." In Hench's case, 25 Ga., 701, McDonald, J., declared it the duty of the judge to enlighten the jury upon the law applicable to self-defence, and to impress upon them that it is not every danger to the slayer which justifies the killing of another; but that it is a danger to his life so great that, in order to save his own life at the time of the killing, the killing of the other was absolutely necessary."

And lastly, in Pound's case, 43 Ga., 128, Lochrane, C. J., speaking for the court, laid down the rule that such testimony was "particularly applicable in cases of self-defence."

This evidence being illegal, the court should not have permitted the defendant's counsel to state for any purpose, in the presence of the jury, what he expected to prove as to it in relation to the matter. The course of the court, so far from being objectionable, as claimed in the 11th ground of the motion for a new trial, is rather to be commended. See Hall vs. State, 65 Ga., 36.

6. The charge to the jury, when taken in connection with the explanations given them in the preceding part of it, the various grades of manslaughter and self-defence, that "if they found from the evidence that defendant and deceased met and a rencontre ensued in which defendant drew a deadly weapon and killed deceased, then whether defendant was guilty of murder or manslaughter would

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depend upon their finding of the fact, whether the killing was done with malice aforethought or not. If done with malice aforethought, it was murder; if not, it was manslaughter," was substantially correct and in accordance with the decision of this court in *Roberts vs. The State*, 65 Ga., 430.

- 7. Nor, under the facts disclosed by this record, are we able to perceive any error in the charge excepted to, when taken in connection with other portions of the charge of the court as shown in the record, that "before the defendant would be excused, under the law, for killing the deceased, it must appear from the evidence that at the time of the killing the danger was so urgent and pressing that the killing was absolutely necessary to save defendant's life." This is almost the identical language used by this court in Hinch vs. The State, 25 Ga., 699, and of the Code, 84333; especially is this true where defendant took no exception to that portion of the charge which follows in immediate connection with the foregoing, viz: that it was also incumbent upon him to make it appear that the deceased was the assailant, or that he, defendant, had really and in good faith endeavored to decline any further struggle before the mortal blow was given.
- 8. There is nothing in the 18th ground of the motion for a new trial. Patrick's intrusion into the court room, where the portion of the jury that had then been selected were confined, was accidental and almost momentary. He remained only a sufficient length of time to address to some of the jury a few idle and irrelevant inquiries, which had no relation to the case, and none of which were noticed or responded to by any of the jurors. Upon being told by the bailiff that it was improper for him to be there, or to converse with the jury, he desisted and left immediately, although he was very drunk at the time. The ten jurors who had been selected testified by affidavit to these facts, and further swore that this intrusion had no

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influence upon their finding. We are satisfied that no wrong was either intended or done to the defendant.

- 9. The grounds in the motion in relation to the bailiff's alceping in the jury room at night and his intercouse with them or absence from them during their meals, are not sustained by the affidavits in the case. True he slept in the room with them every night during the trial, until after the final charge of the court they retired to deliberate thereon, but he did not converse with them, nor did they converse among themselves in his presence or hearing about the case; he refrained from any such conversation. and instructed them to do so. The testimony taken by affidavits conclusively shows that they were never separated from each other, nor were they out of his presence during meal times, and that they saw no one else except the waiters who furnished their meals. Westmoreland vs. State, 45 Ga., 225; Jones vs. State, 68 Ga., 760.
- 10. The remaining grounds which we shall notice specially, relate to alleged newly discovered evidence. Upon which we remark, that the portion thereof which related to the testimony of the witness, Doe, was not newly discovered, so far as the defendant was concerned. He knew it all the time; he was aware that his affiant was present at the conversation to which Doe had testified, but he had never heard the affiant's version of the conversation until the trial was over, and at the trial did not know what he would swear as to the same; but, although he knew this man was present, and although it seems he was accessible, he made no effort to procure his attendance as a witness at the trial.

The newly discovered evidence set forth in the affidavits of Leach and Blanton was of doubtful competency; if present, it could have contradicted the witness Gaddy only upon an immaterial point. But the evidence in both cases could have been received for the single purpose of impeaching the witness named, and a new trial is never

granted where the evidence discovered can be used only for that purpose. Dobbs vs. The State, 66 Ga., 754.

11. The remaining grounds of the motion, that the verdict was contrary to evidence, decidedly and strongly against the weight of evidence, and without evidence to support it, and that it was contrary to law and the charge of the court, were not insisted upon here, and we regret to say that had they been urged, they would have been of no avail. A thorough and careful examination of the testimony satisfies us that the verdict was proper, and we are constrained to order the judgment affirmed.

Judgment affirmed.

# MAXWELL vs. HOPPIE et al.

## [This case was brought forward from the last term under §4271 (a) of the Code.]

1. A grantor executed a deed whereby, in consideration of ten dollars and of the love he had toward his wife and children, he conveyed to the wife certain real estate for and during her natural life, and after her death to go to the above named children, and such other children as she might then have living, by him, share and share alike, their heirs and assigns, etc. The habendum clause was to have and to hold to the wife for life and after her death to the children living at the time of her death, by the grantor; and in case of her death without leaving children, to revert to the grantor, his heirs and assigns. It then proceeded as follows: "With the power and right of the said James E. Butler to act as the trustee for his said wife and children, and as such trustee to manage and control said property, subject to the trust aforesaid, and to collect the rents, issues and profits accruing from the above described property, and to expend the same in the support and the maintenance and education of said wife and children, and should anv surplus remain, to re-invest the same in such other property, subject to the above described trusts and limitations, as he shall deem most for the interest of said trust estate, and with power and authority to the said Elizabeth C. Butler (the wife) to change said trusteeship and select another, upon application to the chancellor." The warranty was to the wife and children of the grantor:

Held, that such a deed created a trust, or charge in the nature of a trust, upon the life estate of the wife for the maintenance, support and education of the children.

- (a.) Under this deed the wife could not manage and control the property, but it was the duty of the husband as trustee to collect the rents, issues and profits, to expend the same for the maintenance and support of the wife and children and the education of the latter, and to invest the surplus, if any remained, in such property as he might deem most for the interest of the estate, upon the same trusts and limitations as those contained in the deed.
- (b.) The power to change the trustee with the approval of the chancellor does not affect the construction of the deed. Such power could have been exercised without any express reservation for that purpose.
- 2. If two clauses be utterly inconsistent, the former must prevail, but the intentions of the parties from the whole instrument should, if possible, be ascertained and carried into effect. The doctrine of repugnant clauses is not favored.
- (a.) This case differs from that in 32 Ga., 588, and from the obiter dictum in 56 Ga., 170.
- 3. No ambiguity requiring explanation by parol was presented by this deed; and it would be improper to create an ambiguity by parol for the purpose of explaining it.
- 4. It follows from the above that the power and right of the trustee were not subservient to his wife's legal estate for life, nor were they personal and attended with no duty to the children.

February 20, 1883.

Deeds. Trusts. Estates. Before H. K. McCAY, Esq., Judge pro hac vice. Fulton County. At Chambers. June 6, 1882.

To the report contained in the decision it is only necessary to add, in connection with the third division thereof, that the bill of exceptions states that "such portions of the affidavits as appear as exhibits to the bill and answer as were not considered by the judge on objection are enclosed in brackets." On turning to the record, no part of the affidavit appears to be so enclosed, but from the argument and briefs of counsel it may be gathered that the judge refused to consider evidence as to certain directions claimed to have been given to J. S. Smith, the father of Mrs. Butler, by J. E. Butler, to the effect that Smith should have the deed made to Mrs. Butler for life with remainder

to her children; also evidence of declarations made by Butler after the deed was executed, stating its legal effect.

HOPKINS & GLENN; L. E. BLECKLEY, for plaintiff in error.

HOKE SMITH; A. C. KING, for defendants.

HALL, Justice.

In order to settle a difficulty between himself and wife, and to induce her, after a separation brought about by his irregular habits, to return, and for the purpose of making provision for the maintenance and support of the family and the education of their children, James E. Butler, on the 29th day of September, 1869, executed and delivered a deed whereby, in consideration of ten dollars and of the love he bore to his said wife and their two children, Katie and Lizzie, he conveyed to the wife certain real estate for and during her natural life, and after her death to the above named children and such other children as she may then have living, by him (her present husband), share and share alike, their heirs and assigns, etc. This is the whole substance of the premises of the deed. The habendum is as follows:

"To have and to hold the above granted parcels of land and premises, together with all and singular the rights, members and appurtenances thereof, to the same in any manner being or belonging, to the said Elizabeth C. Butler for and during her natural life, and after her death to said above named children, and such other children as she may have living at the time of her death by her said present husband, share and share alike, and if she shall die leaving no children or child living at the time of her death by her present husband, then and in that event the said described property shall revert to the said James E. Butler, his heirs and assigns, with the power and right of the said James E. Butler, to act as the trustee for his said wife and children, and as such trustee to manage and control said property, subject to the trust aforesaid, and to collect the rents, issues and profits accruing from the above described property, and to expend the same in the support and the maintenance and education of his said wife and children, and should any surplus remain, to re-invest the same in such other property subject to the above described trust and limits-

tions, as he shall deem most for the interest of said trust estate, and with power and authority to the said Elizabeth C. Butler to change said trusteeship and select another upon application to the chancellor."

Immediately succeeding is this warranty of title:

"And the said James E. Butler, for himself and his heirs and assigns and administrators, the said granted premises to his said wife and children, will warrant and forever defend the right and title thereof against themselves and all other persons by virtue of these presents."

After the execution of this deed, these parties had another child, a son, born to them. James E. Butler died leaving his wife and these three children, all of whom are minors, still in life, surviving him. The wife administered upon his estate, and has lately married Dr. George T. Maxwell. After this marriage, Katie left the house of her mother, and against the mother's consent married George E. Hoppie; upon this marriage, her mother refused to furnish her any support from the income derived from the property thus conveyed. James E. Butler managed the property under the provisions of the deed while he lived. Mrs. Hoppie, by her husband and next friend, filed this bill against Mrs. Maxwell, in which she alleged various acts of waste and mismanagement of the property, and that the conveyance in question created a trust estate during the life of Mrs. Maxwell for the benefit of herself and her children by her former husband, and at her death that the fee vested in the said children. She asked and obtained for herself, her minor sister and brother, who by subsequent amendment were with her made parties to the bill, an order for injunction restraining Mrs. Maxwell from interfering with or managing the property, and also the appointment of a receiver. To this decree Mrs. Maxwell excepted, and now prosecutes this writ of error to reverse She alleges that the judgment below was erroneous:

(1.) Because the deed in question created no trust estate at all, either in favor of herself or of the children; that it conveved to her an unincumbered and unconditional

estate for life, with remainder to such children by her former husband, James E. Butler, as should be living at her death.

- (2.) That the power and right reserved by the deed to James E. Butler to manage and control the property, to collect, expend and invest the income, was subservient to her legal estate for life; that it was personal and discretionary; attended with no duty to the children, was not acquired by the deed, but existed "far more amply" before than afterwards; that he did not take the property from another, but had it himself, and with it all the right and power, and more too, than the conveyance specifies; and that the previously existing right and power was precisely the same, only much broader than such as the instrument had enumerated.
- (3.) If there was a duty imposed upon him by the deed, attended with a right in the children, both the right and duty were inconsistent with the estate conveyed in the premises, and the rule that the subsequent clause was void, where the same deed contained repugnant clauses, prevailed.

These were the only questions insisted upon before us at the argument, and if the positions taken are well founded, they are decisive of the case. But, notwithstanding the difficulties raised by the earnest, ingenious and plausible argument of her eminent counsel, we are satisfied that neither one of these positions, however sound as abstract principles, can be made applicable to the facts and circumstances of this case.

1. The support of these complainants is either a trust, or a charge in the nature of a trust, upon this life estate of the defendant. This follows from the terms of the instrument irrespective of the circumstances that led to and attended the transaction. In Foley vs. Parry, 2 Mylne & K., 138 (7 Eng. Ch. R., 138), it was held that, "where a testator gave his real estate and also his residuary property to his wife for life, with remainder to an infant

ephew for life, a statement in the will that it was his llar wish and request that his wife and the infant's ather would superintend and take care of the infant's ion, so as to fit him for any respectable profession or ment, was held, under the circumstances, and upon fect of the whole instrument, to charge the maine and education of the infant upon the interest taken testator's widow under the will." "The words," am, Ld. Ch., in pronouncing this decree, "though intly strong as regards the requisition, are feeble as maintenance; and are susceptible, though barely tible, of a different construction, namely, as intended intrust the widow and grandfather with a general tendence in the nature of guardianship, which by e testator could not formally and absolutely create. e court is not confined to the particular clause. led to look through the whole instrument, and if it s from the whole that the maker could have had e intention, that is to say, if he cannot without ng after a possibility, be supposed to have had any meaning in the words used than to express a wish re that the devisee should perform a given duty by of the fund given, that fund is as much affected trust as if the most precise and formal words had employed. It is impossible to read this will, and the whole of its contents, without coming to the sion that the testator wished, that is, directed his w to be maintained and educated by his wife; and k he only comprehended the grandfather in the nendation with a view to obtaining for his widow sistance of that male relative of the infant in perg these offices, the expense of which the widow was out of her legacy." His Lordship then proceeds to ases in which trusts have been raised and charges ed by words much less strong and precise than those employed, such as "desire," "request," "recom-" nay, even "authorize and empower," which he

declares "sufficient to impose an obligation which the court will enforce."

Again, "where testator bequeathed to his executors all his freehold estates, annuities, moneys out upon security to interest, and every of them in trust to permit his wife, M., to receive the rents, issues, income, profits and proceeds thereof for her own use and benefit, and for the maintenance and education of his children, naming them, so long as his wife should continue his widow; and in case she should marry, to pay her an annuity of £100 per annum; and subject to such trusts, in trust, after the decease or marriage of M., for his said children, in equal shares, when and as they attain the age of twenty-one; it was held that a trust was constituted of a sufficient part of the income of the property for the maintenance and education of the children, and that such trust was capable of continuance beyond the period of a son attaining twenty-one, or a daughter attaining that age, or marrying; and being of opinion that a discretionary power as to the mode of executing the trusts was given M., the wife, the court directed inquiries for the purpose of ascertaining how such discretionary power had been and how it ought to be exercised." 2 Younge and Coll. 363, (21 Eng. Ch. R. 362).

No formal words are necessary to create a trust estate. Wherever a manifest intention is exhibited that another person shall have the benefit of the property, the grantee shall be declared a trustee. Code, §2305. Precatory or recommendatory words will create a trust if they are sufficiently imperative to show that it is not left discretionary with the party to act or not, and if the subject-matter of the trust is defined with sufficient certainty, and if the object is also defined with certainty, and the mode in which the trust is to be executed. Code, §2318.

Any agreement or contract in writing made by a person having the power of disposal over property, whereby such person agrees or directs that a particular parcel of prop-

erty or a certain fund shall be held or dealt with in a particular manner for the benefit of another, in a court of equity raises a trust in favor of such other person against the person making such agreement, or any other person claiming under him voluntarily or with notice. 1 Perry on Trusts §82. "Indeed, as a general rule, any order, writing or act, by which a fund is appropriated to any particular purpose, amounts to an equitable assignment of that fund. 2 Spence, 860, and cases there cited in note (d).

This court in Hunter vs. Stembridge, 12 Ga., 192, held that where a testator by his will devised to his son Henry the plantation whereon he lived, in fee, and after bequeathing a negro woman to his wife during her life, used the following words: "and I also allow my son Henry to give her a support off my plantation during her life time," that the testator used the word "allow" as expressive of his intention, that his said son should support the wife during her life, off the plantation, and that Henry took the same under the will subject to that charge, which a court of equity will enforce." It is immaterial that all the foregoing were cases arising under wills. The sections quoted above from our Code do not confine the rules therein prescribed to wills, but apply them to all contracts or agreements, and other transactions by which a trust is declared in writing.

In the case before us the intention of the parties to fix this charge upon the wife's life estate is too clear to admit of doubt. The trustee is required in express terms to manage and control the property for the wife and children, subject to the trusts of the deed; to collect the rents, issues and profits accruing from the property; to expend the same for the maintenance and support of the wife and children, and for the education of the latter. And after these objects were accomplished, then it was his duty to invest any surplus that remained, in such other property as he should deem most for the interest of the estate, upon the same trusts and limitations as those contained in the deed.

The wife was not the manager and controller of the property, but the husband as trustee was; she had no power ever it, and could only get the benefit designed for her and the children through the trustee. It is true, the power and authority were reserved to her of changing the trustee and selecting another, upon application to the chancellor; that is, as we take it, if the chancellor approved the change and selection, then it might be done, otherwise not,—a power which would have been exercised by the chancellor, at the instance of any one interested in the trust, independent of the reservation. All this clearly shows that there never was the slightest expectation or intention of entrusting her with the control and disposition of the property itself, or of the entire income arising therefrom; this pertained exclusively to the trustee, whether he was the husband or some one else appointed with the approbation of the chancellor. The property and its income was, from the commencement, under the protection and control of the court of equity.

2. We shall next consider whether there is anything in the charge or incumbrance which this trust imposes upon the estate conveyed to the wife which makes it repugnant to that estate, and consequently void.

The cardinal rule in the construction of contracts is to ascertain the intention of the parties; and if that intention is clear and contravenes no rule of law, and there are sufficient words to arrive at it, then it is to be enforced irrespective of all technical or arbitrary rules of construction. Code, §2755. Now, what are the rules to which we may resort for the purpose of ascertaining and interpreting this intention? The first which we shall invoke is this: that the construction which will uphold a contract in whole and in every part is to be preferred, and the whole contract should be looked to in arriving at the construction of any part. Code, §2757, par. 3. The rules of grammatical construction usually govern, but to effectuate the intention they may be disregarded; sentences and words may be

need and conjunctions substituted for each other. come cases of ambiguity, where the instrument as is is without meaning, words may be supplied (16.,

y marriage contract, made in contemplation of re, shall be liberally construed to carry into effect ention of the parties, and no want of form or techxpression shall invalidate the same. Code, \$1777. nay not the same benignant and indulgent rule of etation be applied to a post-nuptial settlement, espewhen that settlement is made to end family disputes secure domestic quiet? The husband is authorized ress provision of law, at any time during the coto convey through trustees, or directly to his wife, operty to which he has title, subject to the rights of urchasers or creditors without notice. Code, §1776. ard does the law strive to carry out the lawful intenparties to contracts, that it will never resort to the e of repugnant clauses in a deed and declare the void, except in cases of absolute necessity. If two in a deed be utterly inconsistent, the former must , but the intention of the parties, from the whole nent, should, if possible, be ascertained and carried fect. Code, §2697.

cases decided by this court, have been cited as int for their position by the counsel for plaintiff or; the first is Daniel et al. vs. Veal, 32 Ga., There an absolute deed of gift had been made ave, and the donor by a subsequent clause in the eserved to himself the right of revoking the gift. held that this reservation was irreconcilably repugate the operative part of the deed; was incompatible as estate conveyed, and being subsequent thereto id. In delivering the opinion in this case, Jenkins, were with approbation from Shepp., Touch. 88: "In if there be two clauses so totally repugnant that annot stand together, the first shall be received and trejected." This decision was rendered in 1861,

prior to the time when the Code went into operation, and before the liberal method of dealing with such transactions which it requires had gone into effect, yet, the learned judge in the conclusion of his decision says: "It can be scarcely necessary to add, that we decide this case upon common law principles, regarding it entirely dehors the statute of uses and the construction given to that statute in equity," which we now hold is the rule recognized by our Code. The other case quoted, 56 Ga., 170, must have been cited on account of an obiter dictum of Bleckley, J., who delivered the opinion, and who says arguendo: "And if the power of sale is inconsistent with that construction. it is inconsistent with the estate conveved; and being a reservation contrary to the grant, and not preceding but following the words of the conveyance, it should be deemed subordinate, and, if necessary, be declared void." legal title was in the trustee in that case, and the power of sale, which was never exercised, was in the cestui que trust, and the entire instrument received such a construction as to avoid the repugnancy which, under different treatment, would have resulted.

We know of no case in which a charge or incumbrance by way of trust imposed by the same deed upon the estate, though occurring in a subsequent part thereof, has been held to be so incompatible with the estate, as of necessity to be void. The learned counsel for the plaintiff in error have furnished none, and our own careful researches and inquiries have resulted in no such discovery.

To adopt the construction sought to be placed upon this instrument, would require us to reject all that portion of the habendum which provides for the support of the donor's family during the life of the wife; would destroy the charge which the trust places upon the property in favor of the objects of the donor's bounty; would be to disregard the manifest intention of the parties in deference to "technical and arbitrary rules of construction," which the Code time and again forbids in every variety and form of ex-

n as we have seen, and under every variety of cirnces. While we may "transpose sentences and and "substitute conjunctions for each other," and "extreme cases of ambiguity, where the instrument otherwise be without meaning, we may supply words tuate the intention," we cannot, in order to defeat it, nything, except where the two clauses in the same re so "utterly inconsistent," that it would be "ime" to ascertain the intention from the whole instrund to carry it into effect. This, we repeat, we can-"without straining after bare possibilities" and ng in conjectures not authorized by anything apon the face of the instrument or fairly deducible e circumstances attending the transaction and shedght upon the intention of the parties at, before, and uent to its consummation.

he court below committed no error in refusing to er the parol testimony contained in the affidavits on the hearing any further than they related to cumstances which led to and attended the execution deed, and were explanatory of the motives that d the parties to act in the matter.

ase of ambiguity, either latent or patent, was preand scarcely a case of difficult construction. Surely was no necessity to create an ambiguity by resorting I evidence, in order that it might be explained by testimony. We have recently decided, following sinion of Warner, J., in *Hill et al. vs. Felton*, 47 88, that this would be improper.

follows from what we have said, that we cannot in the conclusion sought to be reached from the her position taken by the plaintiff in error, that "the and right reserved by the deed to James E. Butler age and control the property, to collect, expend and the income, were subservient to his wife's legal for life; that they were personal and discretionary, and with no duty to the children; were not acquired Griffin vs. Augusta & Knokville Bailroad.

by the deed, but existed for more amply before than afterwards; that he did not take the property from another, but had it himself, and with all the rights and powers, and far more too, than the conveyance specifies; and that the previously existing right and power were precisely the same, only much broader than such as the instrument had enumerated."

We do not deny, but have maintained, that Butler's dominion over the property was circumscribed and medified by the deed he executed, and this we hold to be essential to the rights and interests of his wife and children, as fixed by the conveyance.

Judgment affirmed.

# GRIFFIN vs. AUGUSTA & KNOXVILLE RAILROAD.

- 1. While the constitution of 1877 (Code, \$5024) provides that private property shall not be taken or damaged for public use unless just and adequate compensation be first paid, yet where a land-owner permitted a railroad company to lay out and construct its road through his land, and appropriate timber thereon, without any objection until the road had been completed and equipped at large expense, his property forming but a small fraction thereof, he could not then enjoin the use of the entire road until his damages should be assessed and settled. One cannot stand by and suffer another to expend large amounts of money on his land as a part of a great system of improvement, and then stop by injunction the entire system until he is paid.
- (a.) This case differs from, and is stronger than, that in 65 Ga., 614

2. Besides the charter prescribes a complete remedy at law.

April 10, 1883.

Constitutional Law. Damages. Railroads. Actions Injunction. Before Judge Roney. McDuffle County. At Chambers. March 9, 1883.

On February 19, 1883, Mrs. Griffin filed her bill against the Augusta & Knoxville Railroad Company, alleging, in brief, as follows: Since 1867 she has been the owner of Griffin vs. Augusta & Knoxville Railroad.

tation in Columbia county, known as the "Home containing sixteen hundred acres, about three ed and seventy-five acres being under cultivation to balance being heavily timbered and used for passon. On October 15, 1879, the railroad took from her own use a strip of land two hundred feet wide and and three-quarters long, extending from one end of antation to the other. The company constructed its on this strip, took one thousand and fifty cross-ties, a hundred cords of wood, quantities of clay, sand, earth, etc.; made great excavations on parts of the rendering them unfit for cultivation, causing stagbools of water, and injuring the healthfulness of the

The embankments were so constructed as to interith the natural drainage of the land, and thereby damage. The company is daily running its engines ains over this track, necessitating the construction pensive lines of fencing, rendering access from one f the plantation to another unsafe. The company ntinuously, since October 15, 1879, taken and damcomplainant's property without her consent and at having made any adequate compensation therefor. ompany is insolvent. Its capital stock is \$130,000.00, nded debt, \$630,000.00. It has defaulted in paying terest on its bonds in January, 1883, and is endeavto sell, lease, assign, transfer or otherwise dispose of nchise and property to persons unknown, but beto be non-residents of Georgia.

prayer was for the payment of proper damages, nat the company be enjoined from disposing of its also in any way, and from further damaging communit or taking or using her property until the payof damages to her; also for subpoena and general

answer was, in brief, as follows: Defendant laid s roadway one hundred and twenty feet wide and nd one-half miles long through complainant's land,

Griffin es. Augusta & Knoxville Railroad.

with her consent and approval, two-thirds of the strip so taken being an old field grown up in pines. Defendant built its road on this strip, and has been running its trains All the other trespasses and items of damage ever since. alleged in the bill are denied. Complainant is benefited by the road passing through her land. The road was constructed in the fall of 1878, instead of 1879, and a claim for damages resulting from such construction is barred by the statute of limitations. The capital, bonded indebtedness and default in the payment of interest are admitted. but insolvency is denied, and the value of the property is stated to be more than the indebtedness. It is admitted that for a good offer the company would sell or lease its property, but not for less than enough to pay its debts and give the stockholders a dividend. Besides, such sale or lease would have no effect upon complainant's claim.

Upon the hearing, the chancellor refused the injunction, and complainant excepted.

SALEM DUTCHER, for plaintiff in error.

GANAHL & WRIGHT, for defendants.

JACKSON, Chief Justice.

1. This record brings before us the sole point whether the refusal of the injunction by the chancellor to enjoin a railroad company, which had completed and equipped its road at the cost of hundreds of thousands of dollars, from running its road through the complainant's land, which was part of the road-bed so completed and used by it, until the damage for the right of way and cutting down and using the timber thereon was assessed,—the entry of the company thereon and use thereof as a right of way and the appropriation of the timber on the right of way not having been legally objected to until the whole road was built and equipped. We think it would have been inequitable to grant the injunction prayed for, under the

Griffin vs. Augusta & Kuoxville Railroad.

he road has not been sold and the original comstituted by a foreign corporation to which the had passed, nor had judgment for damages been as in the case of Gammage et al. vs. The Georhern Railroad Company, in 65 Ga., 614; though hat case, the refusal of an injunction was affirmed ourt. The question of the insolvency of the comthe case at bar is denied, and that fact is contested and the chancellor has passed upon it. ue that, under the constitution of 1877, private cannot be taken or damaged for public use, unless adequate compensation be first paid. Art. 1, ar. 1; Code, 5024; but if the owner allow it to or damaged without legal opposition thereto until ense sum of money has been expended in comnd equipping an entire road, of which his land is ctional part, of comparatively little value, it would enjoin the franchise to the use of the entire road it damage and occupancy were assessed and setne cannot stand by and suffer another to expend o large amounts on his land, as part of a great f improvement, and then stop by injunction the stem until he is paid. He must move in limine. defend at the threshold. Vigilantibus non dors jura subveniunt. Laches is a lock to the door y, which few keys, if any, are strong enough to Certainly none will open it when it has caused the ure of money which cannot be repaid, and caused which cannot be repaired. Pierce on Railways, cases cited; Wood et al. vs. The Macon & Bruns-

nilroad Company, 68 Ga., 539.
sides, the charter prescribes a complete remedy at Redfield, 346 and cases cited. Charter of comacts, 1877, p. 228, Sec. 10, p. 231.
ment affirmed.

#### Steed vs. Cruite et al.

### STEED vs. CRUISE et al.

Where a petition for year's support was a necessary part of the
evidence in a case, and on the trial a motion was made to continue
the case in order that a copy of the petition might be established,
the original being lost, and no reason for delaying to establish
such copy was shown, the motion was properly overruled.

(a.) Nor was it the duty of the judge to suspend the case and sign a rule nisi to establish the paper because the ordinary was disqualified from acting by reason of being counsel in the case. Had the rule nisi been signed, it would not have required a continuance or accounted for the delay in preparing the case for trial.

(b.) The defendant cannot complain that he was allowed to prove by

parol, if he could, the contents of the lost paper.

2. When ejectment was brought against the grantee of a deed and his warrantor, though not nominally a party, employed counsel to defend the case and placed in his hands a deed to be used in the litigation, such paper was legally in the custody and under the power and control of the warrantor, and its production was properly required under a subpana duces tecum served on him.

3. If it were error to admit a deed in this case because it was neither stamped nor recorded, such error did no harm, because the deed was subsequently withdrawn by the party introducing it from the consideration of the jury. Besides, both parties claimed under it; it was drawn from the custody of defendant's counsel, was a link in defendant's chain of title, and was not, in fact, essential to plaintiff's claim.

4. Complaint is made of the rejection from evidence of a power of attorney, upon objection by counsel, without stating what the objection was. It is incumbent upon the plaintiff in error to show affirmatively the error complained of, or it will not be considered by this court. Upon looking into the record, however, a good reason appears for rejecting the evidence.

5. A mere general statement that the court overruled an objection to certain testimony, without stating what the objection was, furnishes

no ground for a reversal.

6. Where land has been properly set apart as a year's support for a widow and her minor children, a sale thereof fairly made by the widow for the purpose of obtaining means to support the family, would pass the title to the purchaser, irrespective of any order of the ordinary; and it is at least questionable whether the ordinary has jurisdiction to order such a sale. Therefore, a request to charge to the effect that the order of the ordinary appointing appraisers to set aside a year's support was their authority to act, and that this, coupled with an order to sell the property so set.

#### Steed vs. Cruise et al.

art, raised a conclusive presumption that the ordinary had obrved all previous requisitions of law as to setting apart the year's pport, and that this precluded the plaintiff from going behind e order to sell and attacking the previous proceedings, was proply refused.

refused. Besides, this request was based on a partial view of the testi-

ony, and excluded from the consideration of the jury the importation, whether or not the order for sale was fairly obtained, he charge of the court fully and fairly submitted to the jury hether or not the essential provisions of law for obtaining a year's apport had been complied with; and a careful inspection of this cord shows that not one of these requirements was fully or subantially followed in this proceeding.

he verdict is not contrary to law, evidence or equity.

nit having been brought for land by nine co-plaintiffs, and a verict having been returned in favor of some of them, no point having been made in the court below, or in the bill of exceptions, that he verdict was for one share too many, it cannot be raised here for the first time.

A verdict may be amended so as to make it conform to the decdecaration whenever the error plainly appears upon the face of the ecord; or, if a part be legal and a part illegal, the court will contrue it and order an amendment by entering a remitter as to that art which is illegal, and giving judgment for the balance, to avoid protraction of contests. Verdicts must have a reasonable contruction and intendment, and are not to be avoided except from accessity.

pril 17, 1888.

Continuance. Lost Papers. Laches. Subpœna. Witse. Evidence. Practice in Supreme Court. Year's pport. Ordinary. Charge of Court. Verdict. Before dge HARRIS. Douglas Superior Court. July Term, 32.

Nine Cruises and one Gentry brought complaint for ty acres of land against Steed. The abstract of title ached to the declaration consisted of a deed from one taway to Joseph Cruise "made in the year 1862, 1863 1864," with seven years' possession by Cruise or those Iding under him, and the statement that Cruise having ed, plaintiffs were his heirs at law. Defendant pleaded e general issue.

### Steed rs. Cruise et al.

On the trial the evidence for the plaintiffs was, in brief, as follows: Attaway, by deed dated July 23, 1863, conveyed to Cruise lot No. 73 in Campbell county, containing 405 acres, more or less. Cruise went into possession and died June 1, 1865, leaving a widow and nine children. The ages of these children were stated June 7, 1881, and were respectively as follows: 38, 36 or 37, 33, 31, 27, 24, 22, 18, 17. He had been in possession two or three years before his death, and afterwards his wife and children remained in possession until the fall of 1870. They moved off the land in 1866, but were in possession by tenants up to 1871, when the widow made some kind of disposition of the property. One Morris placed a tenant in possession in 1872. Steed, the defendant, went into possession in 1876, and has since remained so. He was in possession of the sixty acres in dispute at the time suit was brought One of the children swore that he knew nothing about the sale by the widow, the setting apart of the year's support except what he had heard. (As to this the evidence was conflicting).

The evidence on behalf of the defendant was, in brief, as follows: In 1871, appraisers were appointed who set apart lot number 73 as a year's support for the benefit of the widow and children. The original application appears to have been lost, and there is some confusion in regard to the proceedings, but it was shown by parol that the application was made for Mrs. Cruise by one Watson, and that under this application the year's support had been set apart: no record of the proceedings could be found in the ordinary's office; nor could any of the original papers at first be found; subsequently an order dated "February term, 1871," appointing five appraisers to set apart a year's support, and a return by such appraisers, setting apart lot number 73, was found in that office; and about the time of the trial a record of the order appointing appraisers was found in a book in the office of the clerk of the superior court, the front part of which had been writSteed rs. Cruise et al.

en by the ordinary and the balance used by the clerk for eeds.

Copies of the order and return (made by Watson and he former ordinary) were also introduced, indicating that ne appraisers qualified and made a return March 21, 1871, nd their return was ordered to record on September 21, 871. It was sworn that there was no representation of he estate of Cruise in Douglas or Campbell counties; hat by reason of the refusal of some of the appraisers to ct, a second order was necessary; that subsequently, Vatson still acting, a petition was filed to allow the sale f the land, which was granted, and after advertisement, ne property was sold before the court-house door and as bought by one Morris, who allowed Watson to take a alf interest. Mrs. Cruise made a deed, dated July 3, 872, to Watson and Morris. In it she styles herself guardian of the minor children of Joseph Cruise, late of ampbell county;" recites an order of the court of ordiary allowing the sale of the property for the year's apport of the widow and minor children, granted Deember 13, 1871, the advertisement of the property, the ale in front of the court-house door for \$230, and conveys ot number 73. Morris and Watson held until 1876, when ney sold the property in dispute to Steed, who gave \$300 or it, bought without notice of any claim of the plaintiffs. nd erected valuable improvements.

The jury found for the plaintiffs five-ninths of four-fifths f the land. Defendant moved for a new trial on the following grounds:

(1.) Because the court refused to grant a continuance nd to sign a rule nisi for the purpose of establishing a copy of the petition for year's support, the original having een lost, and the ordinary declining to act in the matter, ecause he was of counsel in the case. The court held hat the contents of the lost paper could be proved by arol, and ordered the case to proceed.

(2.) Because the court required the deed from Attaway v 70-12

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to Cruise to be produced under a subpana duces tecum served on Watson. [It appeared from the testimony of Watson and J. S. James, Esq., that the former, being the warrantor of Steed, agreed to pay the attorney's fee for representing the case; that Mr. James was thus employed and represented Steed in his defense, Watson not being a party in the record, but looked to Watson for his fees; that he called upon Watson and obtained the Attaway deed as one of the papers relating to the case; that after this a subpana duces tecum was served upon Watson, who showed it to James, and that James had the deed at the time of the trial. The court ordered it to be produced.]

- (3.) Because the court admitted in evidence the Attaway deed over objection of defendant on the ground that it had not been stamped or recorded in Douglas county, and after defendant had closed, plaintiff withdrew the deed from evidence.
- (4.) Because the court ruled out on objection, a power of attorney made by Mrs. Cruise to Watson, authorizing him to apply for a year's support for herself and her children.
- (5.) Because the court overruled the objection of defendant's counsel to the introduction of the order of the ordinary dated February Term, 1871, of the appointment of appraisers, the oath of appraisers thereunder, and a return made by Watson, attorney in fact of Mrs. Cruise, to the ordinary, showing the sale of the lot, "the same being shown to be made for the guidance of the commissioners, and all in the hand-writing of the ordinary."

[The ordinary who granted this order, testified as follows: "Watson applied to him for the appointment of appraisers, and then there was something that required another order. Watson went to Buchanan, an attorney, and another order was passed. There was some necessity for another order. It may have been because some of the appraisers refused to act. Anyway it was required; and then witness wrote a form for the return to be made by, and dated it at any date that occurred to him. The order

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s apparently signed February Term, 1871; that is perper the wrong date, for it is witness's certain recollection at the qualification was in March, 1871; does not remember the date; anyway, the papers introduced by the plaint of the order dated February Term, 1871, have nothing do with the case. After the granting of the second ter, the first papers were considered as nothing, the new oplanting them, but the old papers were left in the ce."]

6.) [Blank in the record.]

The order of the ordinary appointing appraisers set apart a year's support for the widow and minor ldren is the authority of the appraisers to set the same de. And the ordinary may grant an order to sell the operty. The authority for the setting apart and the chority for the sale of the land by the widow being own, the law presumed the court of ordinary required the law required to be done before granting the order sell, and you cannot go behind that judgment to inquire to the legality of the order appointing appraisers and ling the land. You will determine from the evidence ether there was an order of the ordinary appointing praisers and for selling the land granted."

(8.) Because the court charged as follows: "The applition of a widow to the ordinary, for twelve months' suprt out of the estate of her deceased husband, should be deein writing, and notice given to the representative of estate, if there be one, stating the grounds of such apcation of the order sought; and the order of the ordinary ould always recite the names of the persons notified, the impliance with the permission required. And it is inmbent upon the defendant to show affirmatively that are was a petition in writing filed by the widow for the pointment of the appraisers and in conformity with the we; if he fail to show this, then the proceedings are

### Steed ve. Cruise et al.

void, and if you so believe, you should find for the plaintiff, so far as this branch of the defence is concerned."

- (9.) Because the court charged as follows: "It shall be the duty of the appraisers to make a schedule of the property set apart by them, and return the same under their hand and seal within three months from the date of their action, to which return objection may be filed by any person interested at any time within six months after filing the same in office, and if no objection is made, or if made and disallowed, the ordinary shall record the return in a book to be kept for this purpose. I charge you that if the return was not made by the appraisers and not returned to the ordinary within three months from the date of their action and if not recorded, or if you should believe that the ordinary passed an order for the sale of the property within six months of the date of the order appointing the appraisers, then I charge you that the proceedings are void and you should find for the plaintiff, so far as this branch of the case is concerned."
- (10), (11), (12.) Because the verdict is contrary to law, evidence and equity.

The motion was overruled and defendant excepted.

T. W. LATHAM, for plaintiff in error.

P. H. Brewster, for defendants.

HALL, Justice.

This confused, blotted and irregular transcript of the record, has puzzled us no little in ascertaining the facts it is alleged to contain. We shall, however, take the grounds for a new trial in the order set forth, hoping rather than feeling an assurance that we clearly understand the circumstances on which they rest.

1. We see no error in refusing to continue the case to enable the defendant to establish a copy of the petition filed on behalf of the widow for a year's support of herself

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her minor children. This matter should not have been red until the case was called for trial, or at least, if d been deferred until that time, some reason should been given for the delay; and that, so far as we can over, was not done. Neither do we understand that it the duty of the judge to suspend the case and sign a nisi to establish the paper, because the ordinary was unlified to act, being of counsel in the case; and if the nisi had been then signed, it is not clear to us that ould have strengthened the showing for a continuance, any manner have accounted for the delay in preparthe case for trial. The plaintiff in error (defendant w), cannot complain that he was allowed to prove by sl, if he could, the contents of the lost petition.

There was no error in compelling the production of Attaway deed for the land in question to plaintiff's er. A subpæna duces tecum had been served on Watwho was not nominally a party to the suit, though he the warrantor of the defendant's title, and had emred the counsel in the case to defend that title, in whose ds he had placed the deed to be used on the trial the d, though actually in the hands of the attorney, was ally in the custody, and under the power and control, he party subpænaed to produce it. To have excused self from the penalty of disobedience to the mandate he subpæna, he had either to produce the paper, or to ar that it "was not then in his power, custody, possest, or control, and was not at the time of serving the pæna." Code, §3515.

If it was error, under the circumstances, to admit the from Attaway in evidence, because it was neither nped nor recorded, it was error that did not hurt, bese it was, subsequently to its admission, withdrawn by plaintiff from the consideration of the jury as evidence. ides, both parties claimed under this deed, and it was wn from the custody of defendant's counsel, who it to sustain the title he set up. He relied upon it as a

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link in his chain of title, and it did not lie in his mouth to impeach it. The plaintiffs really had no use for it; it was sufficient for their purposes to show that their father was in possession of the land at his death, and that they succeeded to the same as his heirs.

- 4. The next ground of the motion for a new trial complains of the rejection of the power of attorney from Martha Cruise to J. P. Watson, upon objection by plaintiffs' counsel, without stating what the objection was. It is incumbent upon the plaintiff in error to show affirmatively the error complained of, or it will not be considered by this court. Upon looking into the record, however, we discover a good reason for rejecting this evidence. There was no evidence of the execution of the paper, and no offer was made to establish the fact by either of the two subscribing witnesses, nor was any foundation, laid in the absence of these subscribing witnesses so as to authorize the introduction of other evidence to prove the execution of the paper.
- 5. The complaint in the next ground of the motion is, that the court overruled defendant's objection to the admission of certain testimony, without stating what the objection was. The omission to specify this, is fatal. That a general objection need not be noticed and acted upon by the court below, has been so frequently ruled by this court that we weary of the repetition of the rule.
- 6. The 6th ground of the motion for a new trial was not certified by the judge, and was abandoned here; and the seventh ground complains of his refusal to charge as requested in writing by the defendant, the substance of the request being, that the order of the ordinary appointing appraisers to set apart a year's support for the widow and minor children is their authority to act in this matter; that this, coupled with an order to sell the property so set apart, raised a conclusive presumption that the ordinary, in passing this order to sell, had observed all the previous requisitions of the law as to setting apart the

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s support; and that this presumption precluded the stiffs from going behind this order to sell, to attack revious proceedings. This request was properly rejector it is, to say the least, questionable if the ordinary had diction to order the sale; because the sale, if fairly by the widow for the purpose of obtaining means to ort the family, would have passed the title to the purpose, irrespective of such order. Tabb et al. vs. Collier, wary Term, 1882.\* Doe, ex dem. Miller et al. vs. Roe tonce, 50 Ga., 566.

part from this, the request is based upon a partial of the testimony, and excluded from the consideration is jury the important issue made, whether or not the for sale was fairly obtained; whether it was the act is widow, or of Watson, who assumed to act as her it throughout the entire transaction, and who, while acting as her agent, became the purchaser of the erty, as it is alleged, and as is supported by some testing, at less than one-third of its value.

The exceptions to the charge of the court, as set out he 8th and 9th grounds of the motion for new trial ch, as they relate to the same subject, we will contogether), are not, in our opinion, well taken. charge fairly and fully submitted to the jury whether application for the twelve months' support was made riting to the ordinary by the widow, upon a proper pliance with the statute as to notice; whether apers were appointed in conformity thereto; whether, g under such appointment, the appraisers had made n of the property thus set apart within the time preed by law; and whether the return was recorded, as ired, after remaining in the ordinary's office the cribed length of time, without objection filed by itors and others; or if such objections had been filed, ame were overruled; and in instructing them that a re in these respects rendered the proceeding invalid. e, 2571, 2573. The attention of the jury was directed

7a . 641.

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by these charges to every essential provision of law for obtaining this allowance, as appears from the above cited sections of the Code; and a careful inspection of this record satisfies us that not one of these requirements was fully or substantially followed in this proceeding. If more specific instructions had been desired by the defendant, he should have requested them in writing. His failure to do so cannot operate to the prejudice of the plaintiffs.

- 8. As to the 10th, 11th and 12th grounds of the motion for a new trial, that the verdict is contrary to law, to the equity and justice of the case, contrary to evidence, etc., we can only say, that it appears to us, that it is in accordance with each and every of them.
- 9. The point was not made or insisted upon in the court below, though it is urged here, that the verdict is too uncertain to render any judgment thereon, for the reason that there is a finding in favor of Jackson Cruise, when the evidence and record show that Jackson Cruise was not an heir of the intestate and not a party to the suit; there was a finding in favor of five of the nine children, and the insertion of Jackson Cruise's name in the verdict would make the finding in favor of six, contrary to the plainly expressed purpose of the jury. However this may be, the question is not before us for determination, because, as we have intimated, it was not passed upon by the court below, and no such question is made by the bill of exceptions. But in order to avoid further litigation and trouble we call attention to the provisions of law for amending verdicts: this may be done so as to make the verdict conform to the declaration whenever the error plainly appears upon the face of the record (Code, §3491); or if a part of it be legal and part illegal, the court will construe it and order an amendment by entering a remitter as to that part which is illegal, and give judgment for the balance. Ib., 3493. That verdicts must, in order to avoid a protraction of the contest, have a reasonable intendment and

a reasonable construction, and are not to be avoided from necessity, is too clear to admit of question or Code, §3561.

ment affirmed.

### MADDOX et al. vs. OXFORD.

se was brought forward from the last term, under §4271 (a) of the Code.]

sband cannot use his wife's separate money to pay his own, and if his creditor knowingly receives her separate funds or husband's debt, she can recover the amount so paid. If and has been invested in realty by the husband's creditor, the and being insolvent, the land is subject to her claim, and she enforce a lien thereon in a court of equity.

witness answers interrogatories propounded to him by the dissioners, clearly and distinctly, and to the same purport he has previously informed complainant's counsel that he lanswer, and afterwards makes an afidavit for defendant that is mistaken, or did not mean so to testify, a new trial will not indered necessary thereby.

e it was sought by the wife to recover from a creditor of her and, who had knowingly received her funds in payment of lebt, the amount so received with interest thereon, and bject land in which such funds had been invested by the credit was a proper subject of equitable set-off against her claim, he husband held a bond for titles from the creditor to the n controversy, which was worth much more than the amount wife's fund invested therein; that the husband was insoland unable to support her, and that she actually subsisted on ents, issues and profits of the land. Contrast 61 Ga., 662, was an action of law.

ile primarily the duty of maintaining the wife rests upon the and, yet where he was insolvent and unable to do so, an apion of her separate fund for her separate use, in purchasing and clothing, would be held in equity to be a payment pro and if the money so applied to her use, arose from land the o which was in the creditor of the husband, upon a bill by a recover from such creditor and subject the land, on the dd that the creditor had knowingly received her funds in payof her husband's debt and had invested them in the land, reditor would be subrogated to the defence of payment by the and, and could, in a court of equity, set off the money so apfor her benefit

- (b.) The amount of such set-off would include only what was spent for the separate use of the wife, not including the support of the children; and it would be for the jury to determine how much of the amount so applied arose from the land and how much from labor, as to which the creditor had no right of subrogation.
- 4. In case of recovery by the wife, it is only the land into which her money entered, on which she can claim a special lien. The other property of the defendant would be bound by her general decree against him from its date, as in case of an ordinary judgment.

March 13, 1883.

Husband and Wife. Trusts. Equity. Liens. Interrogatories. Witness. Evidence. Set-Off. Before Judge SIMMONS. Monroe Superior Court. February Term, 1882.

Mrs. Mattie J. Oxford filed her bill against M. M. Maddox and her husband, J. F. Oxford, alleging, in brief, as follows: In 1875, her husband received of her guardian \$705.27, which belonged to her as a distributee of her father's estate. Previously to that time her husband had purchased from Maddox a certain plantation for which he was indebted the sum of \$2,000.00. He was insolvent at the time of the purchase, and Maddox knew it, and sold to him in expectation of receiving this money which belonged to her, in part payment for the land. Having recived her fund with full notice, Maddox purchased another piece of property known as the Davis place, and paid such funds as part of the purchase price therefor. Neither complainant nor her husband were able to pay the balance of the \$2,000.00 due on his purchase; and in 1878, Maddox sued complainant's husband, obtained a judgment, caused the land to be levied on and bid it in for \$355.00. He then caused the sheriff to dispossess complainant, which was the first knowledge she had that Maddox intended to deprive her entirely of her trust estate. Maddox and complainant's husband are both insolvent, and she claims the equitable title to both tracts of land to the extent that her money was invested therein. The bill waived discovery and prayed that complainant be de-

have the equitable title to both tracts of land to ent that her money was invested therein, and that account to her for rents, issues and profits; that if Is are worth more than the amount of her funds inin them, they may be sold and the proceeds applied paying her claim; for subpæna and general relief. plainant's husband made no defence. Maddox anin brief, as follows: In 1871, he sold to Oxford, comt's husband, one hundred and eighty acres of land 00.00, receiving two notes; the first for \$1,200.00, cember 25, 1871, and the other for \$856.00, being ainder with interest added thereto, due December 2. Oxford went into possession in 1871. He was olvent, but owned a considerable amount of propesides a legacy received from his father's estate veen \$700.00 and \$1,000.00. Before the first note e, Oxford, with the consent of this defendant, e hundred acres of the land to one Ingram for , \$400.00 of which was paid in cash to this defendd credit therefor given to Oxford. This formed a the \$800.00 paid by Oxford to this defendant. that any part of it arose from the separate estate plainant; but if it did, he denies all knowledge or thereof. The remaining \$400.00 which Ingram or his purchase was paid to this defendant at the e of Oxford, and thereupon this defendant made a deed to the one hundred acres; the original bond s which he had given to Oxford was cancelled, and bond and new notes were executed. Oxford failed for the remaining eighty acres. Maddox sued him, d judgment and bought the land at sheriff's sale. chased the Davis land and took title in his own This was done openly and without fraud; comt had notice of it and is barred; this defendant never ed the land with her funds nor did he ever hold it in trust. He owes her no rents or profits. r family resided upon the land purchased from

him from 1871 to 1877, and were supported by the income arising therefrom. He denies all fraud, collusion, insolvency, or notice in respect to complainant's trust estate.

Evidence was introduced in support of the bill and answer, which it is unnecssary to detail.

The jury found for the complainant \$705.00, with interest from December 25, 1871, "and that the land be subject."

The chancellor decreed that complainant recover the amount named with interest and that both the tract of land which had been held by Oxford and that which Maddox had purchased from Davis be sold, or a sufficiency thereof to pay complainant.

Maddox moved for a new trial, on the following among other grounds:

- (1.) Because the verdict was contrary to law, evidence and the charge of the court.
- (2.) Because the verdict was based on the interrogatories of W. B. Davis, in answering which he stated that "Maddox stated about the same as Oxford as to Oxford's ability to pay," which statement was written by mistake of the commissioners and the oversight of Davis, and was not, in fact, true. [In support of this ground, the movant produced the affidavit of Davis to the effect that he did not intend to make any such answer, and did not understand it when he signed the answers to the interrogatories, and that the statement was a mistake. Affidavits of jurors were also offered to the effect that in making up their verdict they considered the evidence of Davis of great importance as being the statement of a disinterested witness; but these were rejected by the court. As a counter showing, respondent produced the affidavit of the commissioners to the effect that each question was read clearly and distinctly to Davis, and the answers were written as nearly in his words as practicable, and in every instance embodied the idea conveyed by the witness; that the answers were read over to him and signed by him; and that they were disinterested, and acted at the instance of the attor-

th parties. They also introduced affidavits of nt's attorneys to the effect that previously to the of the interrogatories, Davis had made statehem substantially corresponding to the evidence nim.]

cause the court rejected evidence offered by show that the land in controversy was worth for 00 per annum; that Oxford had no means; and land and its products were the only means of Mrs. Oxford and her family.

cause the decree was not in accordance with the

otion was overruled, and defendants excepted. ception was also taken to the verdict and de

HALL; STONE & TURNER; JOHN C. REED, for n error.

& TURNER, for defendants.

Chief Justice.

I was brought by Mrs. Oxford against her husM. M. Maddox, to recover \$705.00 with interest,
bund that her husband had used her separate
that amount to pay Maddox in part for a tract
bught for himself, and to charge the land afterd by Maddox for balance of purchase money and
himself at the sheriff's sale, with the debt of
ant, Maddox being cognizant of the fact that the
had used her money thus to pay his own debt.
The charge of the court, the jury found for comprincipal and interest; a motion for a new trial
had on its denial error is assigned here, as well
he decree, because unauthorized by the verdict.
The is no doubt that there is equity in the bill, and
to no error of law by the court, and the facts sus-

tain the allegations, there is no doubt that the verdict is right. The principle is well settled that the husband cannot use the wife's separate money to pay his debts, and if his creditor knows it is her separate fund, she can recover it; and if the fund be invested in real estate by the husband's creditor, the husband being insolvent, the land is subject to her claim, and she has a lien thereon for the amount of it. Code, §§1754, 1783; 54 Ga., 543; 56 Ib., §22; 61 Ib., §662; Perry on Trusts, 122. If the husband held her money, not as a loan, but for her, he was her trustee, and whosoever helped him to misapply it to the husband's own debt, held what he got as her trustee too, and when traced to his land, it is liable therefor. Code, §§3151, 3152, 2316.

- 2. If a witness answer interrogatories put to him by the commissioners, clearly and distinctly, and to the same purport that he had previously informed complainant's counsel that he would answer, and afterwards make an affidavit for defendant that he was mistaken, or did not mean so to testify, a new trial will not be granted on account of such alleged mistake. This case is unlike those referred to in 8 Ga., 136; 10 Ib., 143; 15 Ib., 550; and 54 Ga., 635.
- 3. The jury allowed the complainant principal and interest. The defendant tendered evidence to show that the wife occupied and lived on the land (worth \$2,000,00) in which her money (\$705.00) was invested, and that the rents, issues and profits thereof were worth \$200.00 per annum; that her husband was insolvent and unable to support her; and that she actually subsisted on these rents, issues and profits of the land while the title was in Maddox, and while the husband only had a bond therefor, on payment of purchase money, the testimony being offered with a view to set off the rents against her claim. The court rejected this testimony, and the question on the point is, was the evidence admissible? Or, in other words, can the defendant, Maddox, set off this support of the wife against her claim on him? In Chappell vs. Boyd, 61 Ga.,

in an action at law for the recovery of the wife's in the hands of one who got it from the husband agly, it was held that it could not be so set off. But by scanning the decision in that case, as set out in the a, on page 670, this rule is applied because the wife's y was primarily to the husband, and as he was not y, the doctrine of subrogation of his creditor to his could not be applied in behalf of the creditor. The tion is that, had the case been in equity and the ad been thus made a party, so as to settle the rights the parties, the set-off might have been allowed.

of a court of equity to get her rights; she must, ore, do equity. There is no positive proof that the erived from the wife's father's estate was held in or her by the husband; nor is there any that he held loan from her. If as a loan, the verdict is wrong, ere should be no recovery; if as her trustee, the d is bound to account to her for principal and in-If he has paid her the interest for her exclusive use, ne cannot recover it again from him. If she cannot r it from him, it is difficult to reason to the concluat she can recover it from Maddox; for Maddox is esponsible upon the principle that he has connived ngly with her husband in taking her money for his nd only to the extent of what is due thereon. Does e any difference that her husband paid her the innot in cash, but in any other valuable thing equivacash? And if he did, does her husband owe her ach? If he does not, Maddox does not; no more e would owe her nothing at all, if her husband had e entire debt to her. As intimated in the case of ell vs. Boyd, in 61 Ga., supra, the creditor must logind necessarily stand in the shoes of the husband, subrogated to his rights.

, the proof offered was to the effect that the husvas insolvent and wholly unable to maintain his

wife in the necessaries of life-food and clothing; and that the food and clothing she got during all the time he was in possession of this land, for which he had not paid Maddox, and in part payment of which her money went, came out of this land—the crops made thereon,—and that, therefore, equity, as she knocks at the door of her temple of justice, will not permit her to enter, except upon the terms that she do equity; and if she got food and clothing out of this land so held by her husband, when she demands that the money her husband put in it, of hers, with interest, must be paid her, it is inequitable for her to take that part which she exclusively used herself. It is difficult to imagine a more exclusively personal use of money, or the profits of land, than what she ate and wore on her own person. Of course, while, as long as her husband could maintain her, it was his duty to do so, yet, when he no longer could, and paid her separate money for her separate use, when he paid it to her for that separate use, either money or other thing that brought food and clothing, to that extent his debt to her was paid in equity and good conscience, so far as it went to her exclusive use and separate enjoyment, and she cannot recover that part of it from one who got it from her husband to pay the hus-This ought to be especially so, when the band's debt. husband paid her the food and raiment, not with his own money, or the property, or profits of property, belonging to himself, but out of the profits of property of that creditor of his from whom she seeks to recover.

We do not mean to say that Maddox can set off the entire usufruct of the land, or that spent in the support and maintenance of any of the family. It is only that spent by her for her own separate and sole support; not that of child or children, but that which enured to her exclusive use which can be set off, upon the principle that her husband has paid her that, and has paid it out of Maddox's property, for her own separate support.

Nor do we mean to say how much the land contributed

we much the labor upon it did to this support. That was not put on it by him, and that contribution is not is only what the land would yield, and did yield, and it of its yield that went into her own support. The te must be made by the jury on the new trial, from all pof which may be submitted. Inasmuch as we think he court should have let in this testimony to the jury, ode of reaching this equitable set-off above declared, the aid of other testimony as to the amount the ainant got annually from this land for her own extense, we reverse the judgment and award a new

n regard to the decree, it is unnessary to pass upon new trial is awarded. We will say, however, that ally the land into which her money entered, upon she can claim a special lien. Of course, all the other ty of Maddox would be bound by her general decree thim from its date, just as a general judgment would all.

ring in mind the principle repeatedly rocognized by urt, that transactions between husband and wife be closely scanned, as capable of being secretly audulently concocted to perpetrate wrong upon rs of the husband, and that the principle is more and strongly applicable in cases where no writing sort defines the agreements between them, we are uctant than we would otherwise be, to differ with arned and able presiding judge in respect to the of a new trial; and we send the case back for the of the exclusion of the testimony offered bearing set-off, as well as for the reason that a more thorough gation may open the case to a clearer view of the f the facts and the equities of the parties.

ment reversed.

Craig et al. vs. Webb, sheriff, et at.

## CRAIG et al. vs. WEBB, sheriff, et al.

- Where there are various claimants of a fund under a money rule, and some of them except to the judgment, all of the claimants interested in sustaining the judgment of the court below must be made parties defendant to the bill of exceptions; and this can only be done by serving them or obtaining acknowledgments of service. The sheriff need not be served.
- (a.) Claimants of the fund interested in sustaining the judgment below cannot be made parties plaintiff in error, by amendment to the bill of exceptions, on motion of the dissatisfied suitor.
- 2. Necessary defendants to a bill of exceptions, who have not been served, may appear by themselves, or counsel appearing of record, or whose representation is not contested, acknowledge service and consent for the case to proceed. But if other necessary parties are still omitted, the case must be dismissed.
- 3. In the present case, only the sheriff and one claimant of the fund were served, there being several to whom money was awarded. The claimant served, by consent, assigned certain errors in rulings of the court, under the bill of exceptions filed by plaintiff in error:
- Held, that this did not change the defendant to a plaintiff in error. Had it done so, no substantial party defendant in error, who had been served, would be left.

  March 13. 1883.

Practice in Supreme Court. Parties. Before Judge Brown. Milton Superior Court. August Term, 1882.

A money rule was tried in Milton Superior Court. Webb, sheriff, had raised a fund by the sale of the property of one Rogers. Craig ruled him, and others having judgments against Rogers became parties and claimed the fund, viz: Medlock, Palmer, Rogers, Silvey, Bell and Brown, Baugh, Sloan, Strickland and his wife, Taylor, and W. E. Simmons, attorney. The case was heard on the rule and answer. The court awarded certain sums to the following claimants: Simmons, Bell and Brown, Strickland and wife, Medlock, and Sloan, and the balance of the fund to Strickland. Craig excepted. Strickland and wife joined in the bill of exceptions, and assigned error on certain rulings of the court. Service of the bill of exceptions was acknowledged

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e attorneys for Strickland and wife and by Webb, On the call of the case, counsel for defendant in error to dismiss the writ of error for want of service on ary parties. The motion was sustained.

S. L. LEWIS; W. E. SIMMONS; H. P. BELL; H. L. PAT-, for plaintiffs in error.

RGE N. LESTER; CLINTON WEBB, in *propria persona;* BLECKLEY, for defendants.

on, Chief Justice.

is a bill of exceptions brought by G. W. F. Craig, son S. Bell and John Silvey, who assign error to a ent of the superior court of the county of Milton coney rule against the sheriff, to which themselves ouisa J. Rogers, B. J. Brown, Robert Medlock, w Sloan, James M. Taylor, L. J. Rogers, Hardy iza Strickland, and R. P. Baugh were parties in the below. No party is made defendant to this bill of ions but Hardy and Eliza Strickland, who alone are with it by acknowledgment of service by their l. A motion was made by counsel for G. W. F. one of the plaintiffs in error, to amend the bill of ions by adding thereto the names of Robert Medonn Palmour, Louisa J. Rogers, Robert P. Baugh M. Taylor and Wm. E. Simmons as plaintiffs in

Whilst the statute of 1880-81, pp. 123, 124, addendate, 4272 (b), dispenses with making the sheriff a party die to distribute money, it requires service on all nts of the fund who are interested in sustaining the ent of the court below to be made parties defendant bill of exceptions by service. The only mode of g a party defendant to a bill of exceptions is to serve ith a copy or to get his acknowledgment thereof. It is a party defendant to the bill of exceptions.

### Craig & al. vs. Webb, sheriff, & al.

Medlock and Sloan got a part of the money Code, §4259. under the judgment of the court below distributing it, and they are interested in the affirmance of the judgment, and must be made parties defendant to the bill of exceptions If made parties plaintiff thereto, they would be on the wrong side. We know of no law by which it can be done. The Code, addenda §4272 (b), is imperative that they be made defendants to the writ of error, and the Code, §4259. points out the only way in which that can be done, and that is by serving them. The sheriff is not a party defendant necessarily and substantially, as the administrator was in the case in 62 Ga., 135, 138, but the case falls within the ruling in 66 Ga., 247, where the motion to amend was denied. The interest here, as in the 66th, is antagonistic to plaintiffs in error.

The case in the 62 Ga., 138, was brought by the administrator against the contestants for the fund; this is a rule by one of the contestants against the sheriff, and to which the other contestants were made parties, and were parties against the plaintiff in the rule. The motion to make Medlock a party plaintiff in error, when he does not have any error to complain of, but must want the judgment which gave him the money below affirmed, must therefore be denied. The motion to amend does not include Sloan. If it did, it would be ruled in the same way. And the same applies to Wm. E. Simmons and Louisa J. Rogers, who are interested in the affirmance of the judgment.

So far as Wm. E. Simmons is affected, he could acknowledge service, and he might also for Medlock, as attorney for him, if the fact appeared of record or was undisputed, under Code, section 4259; but the trouble would still exist as to Sloan and Louisa J. Rogers. We can, therefore, see no way out of the trouble in which the cause is involved than to dismiss it. It is true, that the counsel for the Stricklands do also assign error as to others in the bill of exceptions, but that is a mere permissive right. Their

Mayor, etc., of Montezuma vs. Minor, surviving partner

nowledgment of service was procured to make them endants in error; and if they are not, no substantial ty is, and the case would go out, because there would no defendant at all.

Dismissed for want of service.

YOR, etc., of Montezuma vs. Minor, surviving partner.

Inder the charter of the town of Montezuma, the municipal uthorities have full power to abate a nuisance on the report of the oard of health, although such nuisance consists of a mill and achinery run by water. A prior general law providing for the bating of such nuisances did not prevent the legislature from conterring a power to abate them within a town on the municipal uthorities thereof in 1871.

Unless particularly named, or necessarily from its terms therein mbraced, a local or particular law is not repealed by a subsequent eneral law.

f the town authorities having jurisdiction of the subject-matter o not follow the law in administering and applying it to the facts f the case, the remedy is by *certiorari*, and not by writ of prohibiion.

farch 20, 1883.

funicipal Corporations. Montezuma. Nuisance. Laws. unction. Before Judge Fort. Macon County. At ambers, January 16, 1883.

Reported in the decision.

B. B. HINTON; L. E. BLECKLEY, for plaintiffs in error.

IAWKINS & HAWKINS; JOHN W. HAYGOOD, for defendant.

ekson, Chief Justice.

the chancellor, on a bill filed for that purpose, granted rit of prohibition to the mayor and town council of ntezuma, commanding them to desist from abating a

Mayor, etc., of Montezuma w. Minor, surviving partner.

nuisance within the corporate limits of the town; and the grant of that writ is assigned as error here.

1. The question is whether the town authorities were empowered to abate this nuisance, it being a mill and machinery run by water.

By the act of 1833, Code, §§4094, 4095, 4096, 4097, it is enacted that any nuisance may be abated by two justices of the peace upon the opinion of twelve freeholders of the county; if in a town or city, under municipal government, by order of that government; and if the nuisance complained of be a grist or saw mill, or other water machinery of value, it shall not be destroyed or abated except upon the affidavit of two or more freeholders before the ordinary. who is to summon a jury of twelve men, through the sheriff, and try the case at the court house of the county. Inasmuch as this nuisance is of the latter character, it is insisted that the city authorities had no power to abate it; but that the jurisdiction is in the ordinary in all such cases. If the act of 1833, which is a general law, stood alone it might be matter of doubt whether this provision in regard to water machinery and mills, would be applicable to cities and towns and nuisances therein. But the jurisdiction of the city authorities of Montezuma rests on the By that charter, all nuisances are charter of that town. under the supervision of the town authorities. 1871-2, p. 123. The 19th section of that act provides for a board of health whose duty it is to report all nuisances. and thereupon they may be summarily abated. The general law of 1833, did not prevent the general assembly of 1871 from granting a charter conferring broader powers on city authorities. These broader powers are conferred on this city or town, and in our judgment its authorities had full power to abate this nuisance on the report of the board of It is further insisted that the general assembly has subsequently recognized the act of 1833, to-wit: by the acts of 1874 and 1875, codified in sections 4096 and 4097; but these acts merely refer to and embrace the mode

Mayor, etc., of Brunswick w. Braxton.

rrying out the act of 1833, by juries, etc., where that applicable. If its application to Montezuma was a away by its charter, the subsequent law cannot this question. Besides, unless particularly named, cessarily from its terms therein embraced, a general loes not repeal a local or particular law. 67 Ga., 819, 8 Ohio N.S., 131; Sedgwick on Construction of Stat.,

is view of the case renders it unnecessary to pass on uestion whether or not the party should have pleaded be jurisdiction of the town authorities rather than of for the writ; and to consider the inaccuracy, perof applying to equity rather than to the law side of ourt for such a writ, and of mixing up the application he writ of injunction and prohibition together.

If the town authorities having jurisdiction of the submatter, do not follow the law in administering and ying it to the facts of the case, the remedy is by cerri and not by prohibition.

dgment reversed.

# MAYOR, ETC., OF BRUNSWICK vs. BRAXTON.

vidence in this case was conflicting, but there was enough to we misfeasance on the part of the city or its agents in construct the bridge where the accident occurred, and neglecting to keep in repair; and the presiding judge having approved the finding, is court will not interfere.

an action against a municipal corporation for damages resulting in the breaking of a plank in a bridge in one of its streets, the bund of the action is either positive misfeasance on the part of a corporation, its officers or servants, or of others under its audity, in doing acts which caused the street to be out of repair, else neglect by the corporation to put the street in repair, or nove obstructions therefrom, or remedy causes of danger occaned by the wrongful acts of others. In the former case, no ther notice to the corporation of the condition of the street is sential to its liability. In the latter case notice of the condition the street, or what is equivalent to notice, is necessary.

Mayor, etc., of Brunswick vs. Braxton.

Municipal Corporations. Streets. Damages. Master and Servant. Negligence. Before Judge Tompkins. Glynn Superior Court. May Term, 1882.

Reported in the decision.

IRA E. SMITH, by J. H. LUMPKIN, for plaintiffs in error.

No appearance for defendant.

JACKSON, Chief Justice.

This was an action for damages for negligence in making and keeping up a bridge in the city of Brunswick, so that the plaintiff's horse broke through a plank thereof and was injured thereby, so that he died.

The bridge was over a ditch in one of the streets, and the horse broke through a plank of this bridge and got hurt, and died from the effects. The jury found a verdict of one hundred dollars. A motion for a new trial, on the ground that the verdict was contrary to law and evidence, was overruled, and the defendant excepted.

The evidence is conflicting, but there is enough to show misfeasance in making the bridge, and neglect in keeping it in repair, and the presiding judge having approved the finding, this court does not interfere. Therefore a new trial and reversal will not be granted on the ground that the verdict is against the weight of evidence.

Is it against law? The defendant entrusted an agent to make the bridge and to keep it in repair. "The ground of this action in either positive misfeasance on the part of the corporation, its officers, or servants, or by others under its authority, in doing acts which cause the streets to be out of repair, in which case no other notice to the corporation of the condition of the street, is essential to its liability; or the ground of the action is the neglect of the corporation to put the streets in repair, or to remove obstructions therefrom, or to remedy causes of danger occasioned by

Mayor, etc., of Brunswick vs. Braxt n.

ongful acts of others, in which cases notice of the ion of the street, or what is equivalent to notice, is ary." 2 Dillon, 1020.

there misfeasance in this case? The city, by its its employe, put a sappy plank in this bridge. This isfeasance or wrong-doing in making the bridge, by ting under its authority, and the law, as cited from and supported by authorities, makes the city liable h a case.

agent himself swears that he did put such a plank bridge, and that it caused the breaking through of rse.

that the man under the authority of the city put d plank in. It is immaterial that he built it all y right, as he swore, in a general way. The jury had to go on this fact, testified to by himself, that he at plank in, that it caused the damage, and to behat fact rather than his skill in general bridge mak-So that in this view the verdict is not against law.

eover this same agent was to keep the bridge in re-He knew the plank was there, and that a wet place ander it. He was relied upon by the city, and was y agent and servant to keep this bridge in repair. To him was notice to the city, and he had notice, knew the plank was then over a damp, wet place ould rot; yet he did not inspect it, to see if it was and unsafe.

evidence is conflicting, but it satisfied the jury and below of the truth of the case made by the plaintiff; a made by him and the testimony going to corroboim, the facts, when the law is applied to them, give ne right to recover.

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gment affirmed.

Roberts, president, vs. Martin et al.

# Roberts, president, vs. Martin et al.

An administrator's deed, accompanied by the order of the ordinary granting leave to sell, is not mere color of title, although the letters of administration may not be produced. When the order of the court of ordinary granting leave to an administrator to sell the land belonging to the estate of his intestate has been shown, the law presumes that all has been done which was necessary to have been done before the same was granted. This includes not only showing the necessity of the sale, and that it would be for the benefit of the heirs and creditors, but also the fact that the applicant was the administrator and authorised to make the sale.

March 18, 1888.

Title. Administrators and Executors. Before Judge Wellborn. Lumpkin Superior Court. April Term, 1882.

To the report contained in the decision, it is necessary to add only the following: The action was complaint for land. The plaintiff showed a chain of title from the state to him. One link in this chain was an administrator's deed, made by Jarrell Beasely, administrator of R. C. Beasely, to William P. Beasely. With this deed, was introduced a certified copy of the order of the court of ordinary granting to Jarrell Beasely, as administrator, leave to sell the real estate of the decedent. The court charged that this would be only color of title, without the production of the letters of administration. The jury found for the plaintiff. Defendants moved for a new trial, on the ground, among others, that the verdict was contrary to the The court granted the new trial, stating in his order that he was not satisfied that there was sufficient evidence to make out title by prescription in plaintiff. Plaintiff excepted.

WIER BOYD, for plaintiff in error.

W. P. PRICE; S. D. IRVIN, for defendants.

Roberts, president, vs. Martin et al.

RD, Justice.

Roberts, president of the Augusta and Dahlonega ining Company, brought this suit to recover one ed half of lot of land number 147, in the 12th disl 1st section of Lumpkin county.

the trial of the case, the jury, under the evidence rge of the court, returned a verdict for the plaintiff. endant made a motion for a new trial, upon several, one of which was, that the jury found contrary harge of the court, wherein he had instructed them deed of Jarrell Beasely, administrator of Robert ely, with the order of the ordinary granting leave was only color of title, unless his letters of adminate were also produced in evidence. Upon this the motion for a new trial was granted, the judge therein that he was not satisfied that there was at evidence to make out a title by prescription in the plaintiff.

vidence contained in the record shows a perfect le in the plaintiff, unless it is true, as charged by rt, that the administrator's deed, without the proof his letters of administration, was only color of n this, however, we cannot concur, as it is well in this state that the judgment and order of the having jurisdiction of the administration of an gives complete and ample power to the adminissell the realty of the intestate. When, therefore, r of the court of ordinary was shown, granting leave Il Beasely, the administrator, to sell the lands beto the estate of Robert C. Beasely, the law prehat all had been done which was necessary to have ne, before the same was granted, and the court not have gone behind the judgment. This includes the necessity of the sale, and that it would be for efit of the heirs and creditors, but of the fact that Beasely was the administrator, and authorized to

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make the sale. 47 Ga. 195; 50 Ib., 231; 64 Ib., 323. His deed, thus supported, was a sound link in the chain of a perfect legal title, and to limit its legal effect to a mere color of title, requiring it to be supported by adverse possession and ripened into a title only by prescription, was error. The finding of the jury, under the law and evidence, being satisfactory to the judge, except on this question, and his construction of the law on that being, as we hold, wrong, the new trial should not have been granted, and his judgment thereon must be reversed, and it is so ordered. Judgment reversed.

### JACKENS vs. NICOLSON.

## [This case was argued at the last term, and the decision reserved.]

 In written contracts for land, where they are certain, fair and capable of being performed, equity will decree their performance.

In sales at auction, the auctioneer may be considered the agent of both parties, so far as to dispense with any other memoranda in

writing than his own entries.

3. Where the specific performance would be decreed at the instance of one of the parties, it will be so decreed at the instance of the other, although the relief sought by him is merely in the nature of a compensation in damages or value. In such cases, the remedy, if it exists at all, should be mutual and reciprocal, as well for the vendor as for the purchaser.

May 1, 1888.

Equity. Specific Performance. Contracts. Principal and Agent. Statute of Frauds. Auctioneers. Before Judge SNEAD. Chatham Superior Court. March Term, 1882.

Mrs. Jackens filed her bill against Nicolson, alleging, in brief, as follows: In April, 1881, she placed in the hands of Blum, a regular auctioneer in Savannah, a city lot with improvements thereon for sale. It was advertised, and on April 5, was offered at public outcry, and sold to Nicol-

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e highest bidder, at the price of \$1,900.00 cash. n memorandum of the sale and its terms was enthe auctioneer on his books. Nicolson employed ey to investigate the title to the property, and to delivered, at the request of Nicolson, the deed nich complainant claimed, being a deed from one ast to her deceased husband, dated April 30, 1853. tion by the attorney that the deed did not furnish cient data to locate the property and pass upon complainant tendered him a map made by the eyor and referred to in the deed, from which, as rom other published maps, the property could be entified. Complainant also tendered such infornd data as was in her power to give. No answer e to this tender, no abstract demanded or further ed. After waiting for over a month, she wrote to , calling upon him for an answer, and stating her s to make a deed to the property. Still failing to reply, she caused a proper warranty deed to be nd tendered it to Nicolson through the auctioneer. referred the auctioneer to his attorney, who hat he had no money belonging to his client. nant has made repeated efforts to get Nicolson to he deed and pay the money, but he has failed and to do so. He further made inquiries about her such a manner as to cause suspicion concerning it; reason of this and the delay until the season for geous selling had passed, as well as the expense , she cannot be restored to her original position, d she now sell the land without heavy loss. s conveyed in 1853 by one Prendergast, who had t title thereto, to the deceased husband of comt. The latter has since died leaving no heir except nant and no unsettled debts. Her husband, and is sole heir, have been in possession ever since the e from Prendergast; and she has a perfect title, by regular chain, but also by reason of twenty

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years' possession and by reason of seven years possession under color of title. The object of this bill was to compel specific performance on the part of Nicolson.

On demurrer for want of equity and because of an adequate common law remedy, the bill was dismissed, and complainant excepted.

R. R. RICHARDS; J. J. ABRAMS, for plaintiff in error.

LESTER & RAVENEL, for defendant.

CRAWFORD, Justice.

This bill was filed for the specific performance of a contract in the purchase of certain real estate at public auction, and where the purchaser refused to take the deed and pay the contract price. The bill was dismissed, on demurrer, for the want of equity, and because the complainant had an adequate and complete remedy at law.

Conceding that the memorandum of the auctioneer made at the time of the sale is all that is required by law, the only question in the case is, whether the complainant is entitled to a specific performance of the contract.

This question, we think, is clearly settled by this court in the cases of Chance vs. Beall, 20 Ga., 142, and Forsyth vs. McCauley, 48 Ib., 402. In the first it was held: "Where a contract is in writing—is certain and fair in all its parts—is for an adequate consideration, and capable of being performed, it is just as much a matter of course for a court of equity to decree a specific performance as it it is for a court of law to give damages for it in other cases." In the last, the above ruling was re-affirmed, and the principle again laid down that "in written contracts for land, where they are certain, fair and capable of being performed, equity will decree their performance." Story's Eq. Jur., §746; Hilliard on Vendors, 421, 454.

How far at the hearing the allegations of the bill may

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stained by the proof, it is unnecessary here to con-We put the case, under the demurrer, upon the scited supra. That the auctioneer was the agent h parties to bind them, if his entries were legally is declared by §2630 of the Code. If, then, this is , the contract will be held to be in writing, then it be further shown that it was certain, fair in all its and capable of being performed before a decree for urpose will be rendered.

stance of one of the parties, it will be so decreed at stance of the other, "although the relief sought by merely in the nature of a compensation in damages are"; "for in all such cases the court acts upon the l that the remedy, if it exists at all, ought to be and reciprocal, as well for the vendor as for the aser." 1 Story's Eq. Jur., §723; Fry's Specific Perfece, m. p. 10., §23.

gment reversed.

## Brown vs. West et al.

evidence was conflicting, and the jury believed the defendant; ourt below ratified their verdict, and this court will not inter-

re a wife's money was used to pay for land to which title was a in the name of the husband, in an effort to subject the land mortgage creditor of the husband, the controlling question whether the creditor gave credit to the husband on the faith at property and without notice of the wife's equity. If so, he subject it; but if he did not give credit on the faith of that crty, and knew of the wife's equity, he could not subject it. If it was given on the faith of other property, he would not be by the existence of a secret equity in the wife.

band and Wife. Debtor and Creditor. Before. LAWSON. Greene Superior Court. September Term.

Brown rs. West.

Reported in the decision.

JOHN C. REED; L. E. BLECKLEY, for plaintiff in error.

W. H. Branch, for defendants.

Jackson, Chief Justice.

This is a writ of error to the refusal of a new trial by the court below. The property was levied on by a mortgage fi. fa., as belonging to the defendant in that fi. fa.; his wife claimed it, because her money paid for it, and because, when the mortgage was made by her husband, the plaintiff had notice that her money paid for it.

- 1. The evidence before the jury is conflicting on the question of notice. The plaintiff swears that he had none; the defendant swears that he told him that the land was his wife's, and that her money paid for it. The jury believed the defendant; the court below ratified their verdict; this court does not interfere in such cases.
- 2. The court charged that, if the jury believed from the evidence "that plaintiff gave credit to the defendant in fa., on the faith of the land in controversy, and had no knowledge of the secret equity of claimant, that they ought to find for plaintiff. But if they believed that plaintiff did not give credit to defendant on the faith of the land, and did have knowledge of the equitable claim of claimant, then they ought to find for claimant." Error is assigned here, that this charge is erroneous in relation to plaintiffs giving credit to the defendant on the faith of the land.

We do not see the error. The evidence is uncontradicted that the wife's money paid for the land. If so, it was hers, unless plaintiff's mortgage took it from her, because the legal title was in the defendant, and plaintiff did not know of her equitable title, and not knowing it, credited defendant on the idea that he had title to the land. If he credited him on other property, he was not hurt by this equitable

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ing unknown to him; but if he credited him on the hat the title, the good, complete title; was in him, a was hurt by the claimant's setting it up, when he norant of it. The court, we think, put the issue by on the facts on which the law would decide it bethe parties, and the judgment is affirmed.

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## DANIEL & COMPANY vs. TARVER et al.

e having been tried on October 28, a motion for new trial made g the term, and granted on January 31 thereafter, and a bill of tions tendered on February 7, it was too late to assign error lings made at the trial. The grant of the new trial could be reviewed.

re one who had induced another to give credit to a third party, at the account, made out in gross, at half price, risking its paid, and gave his note therefor, which was renewed with ity when it fell due, to a suit brought on the renewed note it to valid defense that the account had not been assigned to n writing so that he could sue in his own name, and that the r was insolvent, it appearing that he could have sued in the of the creditor or could have obtained a written assignment quest, but did not ask or desire it. A verdict for the plaintiff ight, and should not have been set aside as contrary to law. assignment should be in writing to pass the legal title to an account.

17, 1883.

racts. Statute of Frauds. New Trial. Consider-Before Judge SNEAD. Richmond Superior Court. or Term, 1881.

aniel & Company, as transferees for value, brought ainst R. Tarver and R. G. Tarver on a note made by o Miller & Daniel and indorsed by the latter.

endants filed the following pleas:

The general issue.

Total failure of consideration, "for that defendants aid note to Miller & Daniel (who assigned said note ntiffs after maturity), for a certain statement of ac-

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count against one T. E. Ponder, which account said plaintiffs represented as just and true, and so warranted it; whereas, said account was not due by said Ponder to Miller & Daniel; wherefore defendants were unable to realize anything upon said account, which was, as aforesaid, the consideration for which said note was given; and of this they put themselves upon the country."

(3.) Total failure of consideration "for that defendants have used all diligence to collect the said account of said Ponder, but have wholly failed because of his insolvency,

and refusal to pay."

The evidence made substantially the following case:

Z. Daniel, one of plaintiffs' firm, was a member of the firm of Miller & Daniel at the time the note was given, and at that time had notice of its consideration. Plaintiffs' partnership was entered into after dissolution of Miller & Daniel, and the note sued on was purchased by them for value, before maturity. One T. E. Ponder, of Jefferson county, Ga., applied to Miller & Daniel of Augusta, Ga., for a line of credit in groceries, etc. Daniel, knowing that defendant R. G. Tarver was formerly of Jefferson county, called on him and inquired as to the responsibility of Ponder. Tarver replied that he was a good man and responsible, and it was largely on the faith of this recommendation that credit was extended. [Tarver swore that he recommended the Ponder family as good men, but did not include this particular Ponder].

When the account became due, Daniel again called on Tarver and told him that they had collected about all they could from Ponder. Tarver said he thought the account good, and offered to buy the same. Miller & Daniel agreed to this, and sold it to him for about 50 per cent of the balance then due, and took his note for the amount of the purchase money. They delivered to him an unitemized statement of account against Ponder, which was accepted by Tarver. This paper was not produced on the trial, having been lost by defendant. Tarver says there was no written transfer thereon. Plaintiffs do not recollect, but

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here was none. No demand was then made for a transfer, and none since, nor was any objection plaint made on that ground. the time of the trade in reference to title, but both thought the legal title passed by the parol assignnd such was their intention. The assignors intended every thing that was necessary to enable the asto collect the claim. Neither party knew that writnsfer was necessary to pass title, or the difference n legal title to, and an equitable interest in, a chose on. The account was valid and unpaid. ranty as to collectibility of the claim. On the con-Daniel told Tarver that they had been unable to colfiller & Daniel surrendered all interest in the claim, de no further effort to collect. They have always nd are now, ready and willing to make a written r and give any other writing Tarver may ask or also to allow him to use their names in suing im, and to give him free access to, and unobd use of, firm books containing items of account d to. Tarver, after the purchase, kept the account wo months, without seeing or communicating with . He then went to Jefferson county, and asked tor for payment, who refused, and has ever since repay. Tarver has never sued the claim. y Ponder is insolvent. Plaintiffs do not know his al condition. At the maturity of the note, Tarver he was unable to pay; asked for further time; said if as granted, he would make the note good by his fathne. This was agreed to, interest added, and the note n executed by father and son. Roberson Tarver interest in the claim; signed at his son's request as

jury found for the plaintiffs. Defendants moved ew trial on the ground that the verdict was cono law, evidence and the charge of the court. This anted, and plaintiffs excepted.

Daniel & Company vs. Tarver et al.

HARPER & BROTHER, for plaintiffs in error.

W. H. Fleming, for defendants.

Jackson, Chief Justice.

1. The verdict in this case was for the plaintiffs. The defendants were granted a new trial, and the plaintiffs excepting to that judgment, bring this writ of error here. They also excepted to many rulings of the court on the hearing before the jury; but all these were stricken here because the time had elapsed within which they could be excepted to.

The grant of the new trial alone on the grounds that it is contrary to law, to the evidence and to the charge will be considered.

2. They make a single point: Is the sale of an account in gross, and not itemized, a valid consideration to support a promissory note, payable in bank, and renewed once with a surety thereto, where the account was not sued or attempted to be sued by the maker of the note, but presented for payment and refused, after being held some time, and when the maker of the account was insolvent, and the intention of both parties to the trade was to pass full title to the account?

The assignment should have been in writing, in order to pass the legal title. Code, §2244; 63 Ga.; 681.

But has the consideration on which the promissory note was given wholly failed by reason of that not being done?

The man who owed the account when it was presented failed and refused to pay it, not because the title was not good in him who presented it, nor for the want of a bill of particulars, but because he was insolvent. The suit could have been brought in the name of the parties who sold the goods, if suit had been necessary; or the assignment could have been put in writing, and the account all itemized, which the plaintiffs were ready to do; but the maker did not ask or desire this to be done, but was satis-

he could not collect it, and to sue for it would n to send good money after bad, and to lose all at knew the person who made the account; he had laintiffs to credit him; he had bought the account ice; he risked its being paid, and expected to make nuch as he gave for it; and when, after two months. he maker of the account and found he could not e pleads total failure of consideration. When one risk of the solvency of a debtor to another whom duced that other to credit, and gives his note for nt against that debtor at half its nominal value, s the account until the note at ninety days is and the renewed note with security falls due. pleads total failure of consideration on the mere hat the legal title to the account did not pass so it in his own name, though he could have sued in of the seller, and when he could have got the by asking for it, so as to sue in his own name, if he o sue, but really had no such desire, and could de nothing by suing, he ought in justice and equity , and a verdict finding that he shall pay it, predthese facts, is not contrary to law and ought not oeen set aside.

ent reversed.

TRAL RAILROAD vs. BRINSON, by next friend.

ces presiding. Argued at the last term, and decision reserved. The

ds, for the benefits and privileges conferred upon them, portant duties to the public, which they are strictly enjoined orm; and to enable them to perform such duties, they are to the unobstructed use of all the means which the law at their disposal for that purpose.

a railroad company has the right to the exclusive use of its cuts and embankments, except at crossings, nevertheless, a mere wanton or malicious act of an employé, acting in the

scope of his duty, or such gross negligence as is tantamount to wilfulness, causes an injury to a trespasser upon the track, cuts or embankments of the road, it will be held responsible.

- 3. If a plaintiff, by ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover; but in other cases, the defendant is not released, although the plaintiff may, in some way, have contributed to the injury sustained. No person shall recover from a railroad company for an injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the plaintiff and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him.
- (a.) The presumption (except in case of suits brought by employés, Code, §3036) is against the company; and this rule is also taken from the common law.
- 4. The plaintiff, a boy over fifteen years of age, with others, had been in the habit of walking along the railroad track in going to and from school, it being a better walk than the dirt road near by. He had been accustomed to remain on the track until the cars camenear to him, and a short time before the accident, had twice received the complaints of one of the employes of the road, for waiting too long in getting from the track. He knew about what time the train might be expected. On the day of the accident, he and a girl, smaller than himself, were walking on the track; the approaching train could be seen more than a quarter of a mile distant; he remained on the track until it came very near him; he then stepped off on one side upon a pathway running beside the track; his distance from the track was estimated differently, but was small; he could have gone further, the bank being sloping and not high; he stood till a large part of the train had gone by, and was looking at the wheels, when he was struck (as he claimed) by a piece of plank projecting from a flat car, was knocked down and run over:

Held, that he was bound to be watchful and careful, and the absence thereof makes him chargeable with negligence, which will prevent a recovery. His conduct in this case would, perhaps, not have been short of culpable negligence even in one who was rightfully on the track; and it might and could have been easily avoided.

(a.) Slight circumstances may overbalance the presumption of freedom from negligence which is supposed to exist in favor of the plaintiff, such as his being found in a position of danger unexplained, the free use of intoxicating liquors, careless habits, etc.

(b.) The rule of diligence will vary with the facts of each case, and reasonable diligence is to be determined from the facts and surrounding circumstances.

(c.) The company's servants may ordinarily presume that a person

age and capacity, who is walking on the track at some disbefore the engine, will leave it in time to save himself from ; or, if approaching the track, that he will stop, if it becomes rous for him to cross it. This presumption may not be justinder some circumstances, as in case of a person intoxicated, , or otherwise off his guard.

ilure to give precautionary signals, when in no manner caus-

contributing to the injury, does not impose a liability upon impany. If the traveler knew by other means of the coming the omitted warnings cannot be the cause of the collision. The walks upon the track of a railroad, not at a road crossing, respasser thereon, and while the road would be liable for a control or wilful wrong of its agents, acting within the scope of their or for gross negligence or carelessness, evincing reckless distribution of the safety of others; or where they perceive the danger arty in time, and make no effort to avoid it,—still, the comis under no such obligation to a trespasser as to those who roperly and lawfully upon its premises, either for the pur-

of transacting legitimate business with it, or in furtherance of reserved to them by law.

s the duty of every man to conduct himself and to manage operty with ordinary care and diligence, and with no more hat, unless he has increased or diminished his responsibility suming some special relation with the person who seeks to be it. But if one does a gratuitous act for another with the tof the latter, his responsibility is reduced to the duty of y slight care and diligence, and to that extent he is bound; in the other hand, the party receiving the favor is bound to itse great care and diligence therein for the benefit of the party rring it.

e common law has a peculiar regard for human life, and for eason, exacts a greater degree of care when life is at peril than lation to any matter of mere property. It requires from all ns, including those who render gratuitous services, at least ary care for the safety of life.

ere is a difference as to the degree of care to be observed by ompany's servants to one who avails himself of a gratuitous lege, and a wrong-doer.

person who is neither a lunatic, idiot nor insane, and who has ed at fourteen years of age, or before that age, if such person is the distinction between good and evil, is held responsible time; under ten years of age, he is not responsible; and he is ally responsible in cases of tort, provided he has reached those is of discretion and accountability prescribed by the Code formal offences.

is case differs from 64 Ga., 306, and 60 Ga., 339.

6. The mere fact that people have frequently trespassed upon a rail-road track, and that the company may not have resorted to any means to stop the same, will not imply consent to such use of the track; nor will it create any right in the public by such user.

(a.) When a railroad, by authority of law, goes into possession of land for the objects of its creation, is not that an appropriation to specified uses? and can it divert this use to purposes wholly inconsistent with those which it is authorized to pursue, and which may imperil the lives of travelers and freighters on its train, without incurring a forfeiture of its privileges? Quære.

(b.) A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of

the owner to provide against the danger of accidents.

7. The verdict was contrary to law and evidence, and a new trial

should have been granted on that ground.

8. In charging on the subject of contributory negligence, it was error in the court to charge as follows: "A railroad company is bound to use ordinary care in the running of its trains, to prevent them from coming in collision with the person of another; and this it is bound to use, even if that other is, on his side, in some degree negligent; therefore, if damage happen to such other person by a collision which the company, by the use of ordinary care, might have prevented, the company must make good the damage." Such a charge left the jury to infer that they were at liberty to find the entire amount of the damage done to the plaintiff, without making any abatement for the negligence chargeable to him.

The attention of the general assembly is called to the growing evil
of using railroad tracks and embankments as footways, and their
interposition to prevent so perilous a practice is invoked.

JACKSON, C. J., concurring:

1. The judgment of reversal is concurred in on the ground of error in charging as to the measure of damages, the expression "must make good the damage" being calculated to mislead the jury and convey the idea that the company must pay full damages, thus withdrawing from the jury the doctrine of contributory negligence as lessen.

ing the damages which they might give.

2. Where a parcel of youths and children are in the habit of passing to and from school on a path within the right of way of a railroad company, and have been for years in that habit within the limits of a village, in the knowledge of the railroad authorities, they are not trespassers to the extent and in the sense that the railroad company is only liable for gross negligence, if any of them be killed or injured. On the contrary, the company is bound to use all ordinary and reasonable care and diligence to avoid injury to them, and to neglect to use such reasonable and ordinary care and diligence would make the company liable. As to passengers, extraordinary care and diligence is required.

uestions of negligence are for the jury. The quantum of dilice required of the railroad by law being given by the court, it or the jury to say whether or not the facts proved make that ntum, subject to a review by the court to see if there was suffiat testimony to support the verdict.

a railroad train swept through a village without ringing its or slacking its speed, with a scantling projecting unusually n its car beyond the track, though within its right of way, and reby a youth was hurt in its rapid transit, the company is liable, ess by the use of ordinary care he could have avoided the conuences to himself of such transit, or the injury was caused by negligence alone. If both himself and the agents of the comly were at fault, but neither the sole cause of the injury, and if could not by ordinary care have avoided the consequences to iself, then the damages should be proportioned according to the ault of each. The jury pass upon the facts, having in view the of the plaintiff, previous warnings, if any, and all the surroundcircumstances.

e main question in this case is ruled in 60 Ga., 339. See also 37

., 593; 60 Ga., 441; Code, §§2061, 2063, 217.

zust 27, 1883.

ilroads. Damages. Negligence. Torts. Minors. In-. Trespassers. Before Judge Snead. Burke Supe-Court. November Term, 1881.

fferson Brinson, a minor, represented by his father and friend, James Brinson, brought his action for damages st the Central Railroad. His declaration alleged that ebruary, 1877, the Central Railroad being the lessee e Augusta and Savannah Railroad, and operating its so carelessly and negligently loaded and run its engine ears in the county of Burke that they ran over and ed the foot and ankle of plaintiff, causing him to lose ame and otherwise injuring him. Damages were laid 0,000. Defendant pleaded the general issue.

the trial, the evidence for the plaintiff showed, in

, the following facts:

aintiff was a boy fifteen years of age, living in the of Lawtonville, Burke county. He attended school ne opposite side of the town from that where he lived. about three miles distant from his home.

quently walked to school, and in doing this he was accustomed to walk along the track of the A. and S. R. R., which was leased and operated by the C. R. R. There was a dirt road running along the line of defendant's right of way, but it was not suitable for the use of foot passengers, and in winter was muddy and almost impassable. Near the school house there was a culvert under the railroad, which had become partly stopped up, causing a pool of water to collect and rendering the road unsuitable for walking. It was the common custom of persons passing through Lawtonville on foot to walk along the railroad Not far from the school house the railroad was elevated above the ordinary level of the ground, and ran along an embankment about six feet in height. On the morning of February 7, 1877, plaintiff, in company with a girl who was attending the same school, was walking along the track towards the school house. within about two or three hundred yards of his destination, and mid-way between a switch and the point where the wagon road crossed the railroad, being about twenty vards from each, he saw a wood train approaching him. It was about two or three hundred yards distant. track was straight for about a mile, and there was nothing to prevent seeing the train. When the train had arrived within from twenty-five to forty yards of plaintiff, he stepped off the track on to the embankment, as did also his companion. At this point the embankment was about four or five feet wide outside of the track. Plaintiff moved some three feet from the track to allow the train to pass. His companion was a little in front of him and slightly further from the track. She was also not so tall as he The train was composed of four or five box cars and several open flat cars, the box cars being next to the engine, the flat cars following, and the conductor's cab being last. There was nothing to prevent the conductor from seeing the entire train. It was running at a very rapid speed; more rapidly than usual. The rate was estimated at from

to thirty miles per hour. The engine and box cars plaintiff without injury to him. Plaintiff was watche passing cars when a flat car near the middle of the pproached him, and he noticed a piece of plank or projecting from it. He at once dodged, and ened to escape the blow which he saw was imminent, was impossible to do so, and the plank struck him on ad, knocking him down, and his right foot and ankle crushed. The plank which caused the injury was nine or ten inches wide, two or two and a half inches and eighteen or twenty feet long. It projected six nt feet beyond the side of the car. After striking ff, it struck the upright iron switch a short distance l him, with such force as to bend it over. This was situated from four to six feet from the track, y the force of the collision between it and the the latter was knocked from the train and stuck in ound. An indentation was found in the plank, sly estimated to be from three to six feet from the it. When the train passed Perkins' junction, about d a quarter miles from Lawtonville, before the acciappened, the plank was seen to be projecting three feet from the car, by two or three witnesses. One parties who saw it motioned to some one on the nd hallooed, but nothing was done in regard to it. istle was blown or signal given before the accident ed. Plaintiff could have left the embankment enbefore the train reached him, but moved to a diswhich he considered safe, and where the train, ordiloaded, would have passed him without injury. The road which crossed the railroad was one in common d had a plank crossing over the railroad track kept ir by the railroad, but there was no sign-board at ossing. There was a signal post about three hunards beyond the point where the accident occurred. son of the injury, plaintiff was confined to his bed umber of weeks; was compelled to have his leg

amputated, suffering great pain from it; his health was impaired, and he was rendered permanently unfit for any active business which would require walking or standing.

The evidence for the defendant was, in brief, as follows: The train in connection with which the accident occurred was a wood train going from Augusta to a point above Millen for wood. It was composed of three box cars next to the engine, twelve empty flat cars, and the cab. It was not the habit of wood trains to stop at Lawtonville unless there were cars to be left there, which was not the case that morning. It was a dark and foggy morning, and the conductor could not see the piece of timber from the cab. it being ten cars distant from him, and the standards being up in the ends of the flat cars. He kept the usual lookout, and observed the usual precautions. The average speed. according to schedule for that train, was from fifteen to eighteen miles per hour. On account of the darkness of the morning, and foggy state of the weather, the train was running a little slower than usual. There was a light down grade at the point where the accident occurred, extending about three-quarters of a mile. As the train neared the school house, the engineer saw some children on the track, and opened the cylinder cock for the purpose of letting off steam and scaring them off. He also saw the plaintiff and the young lady with whom he was just above the switch on the track. They stepped from the track, the engine passed them, and the engineer knew nothing of the accident until sometime afterwards. When they stepped from the track the girl or young lady was farthest from the train. The plaintiff was very close to the cars, being within a foot or a foot and a half of them. The iron stirrups into which standards are inserted on flat cars, project about five inches from the side of the cars and to or beyond the ends of the cross-ties. Two or three of the persons on the train noticed that plaintiff was very close to the track, and one of them remarked upon it. The conductor saw plaintiff very close to the cars, saw him

id not know the cause of it, but thought that he had struck by one of the standards. Plaintiff got up t immediately upon falling, and the conductor did ink that he was injured. The right of way of the d is one hundred and fifty feet in width and belongs company. The railroad was built before the village vtonville was in existence. Sometimes freight probeyond the side of the cars, and sometimes wood ts a foot or two. On one occasion a large wheel was d over this track which projected two or three feet d the edges of the car. On two previous occasions walking on the track, plaintiff had delayed in getff until the train was very close to him, so as to cause aint from the section-master and on one occasion comg him to slacken the speed of the train. r saw a man motioning to him at Perkins' station, but same person had previously spoken to him about ing some cars, he thought the sign had reference to On a previous trial of this case, plaintiff swore that s looking to the side of the car passing, and happenturn his head, saw the piece of timber projecting the open car.

e jury found for the plaintiff \$11,500. Defendant d for a new trial on the following grounds:

- Because the verdict is contrary to the following e of the court: "The plaintiff is bound to make out on entire case by testimony, so far as regards himself efendant. If he fails to do so in any particular, he of recover."
- Because the verdict is contrary to the following of the court: "If the railroad company, or its oyes, were negligent at the time of this accident, yet at negligence did not cause or contribute to the injury is plaintiff, he cannot recover on that ground."
- ) Because the verdict is contrary to the following ge of the court: "If the engineer failed to blow the cle or ring the bell, and even thus violate the statute,

yet if Brinson, plaintiff, had all the notice of the approach of the train, by actually seeing it, which he would have had by the whistle or the bell, then he cannot recover on that ground."

(4.) Because the verdict of the jury is contrary to the following charge of the court: "Even though the officers and agents of the railroad company were guilty of negligence on that occasion, yet if Brinson, by the exercise of ordinary care and diligence, could have avoided the consequences to himself of that negligence, he cannot recover."

(5.) Because the verdict is contrary to the following charge of the court: "And where the evidence shows that plaintiff failed to use this care and diligence to avoid the consequences to himself, it is not a case of contributory negligence, but plaintiff cannot recover at all."

(6.) Because the verdict is contrary to the following charge of the court: "A traveller who selects the track of a railroad on which to walk does so at his peril, and is bound to make vigilant use of his senses of sight and hearing to avoid collision, and if he neglects to do so and is injured thereby, he cannot recover, even though the railroad company is chargeable with negligence."

(7.) Because the verdict is contrary to the following charge of the court: "Even though the train was running at a greater speed than was proper, yet if the plaintiff could have avoided the consequences resulting therefrom by the use of ordinary care and diligence on his part, he cannot recover."

(8.) Because the verdict is contrary to the following charge of the court: "It is not the duty of a railroad company under the statutes of this state, to blow the whistle when its trains are passing through an incorporated town."

(9.) Because the verdict is contrary to law, in that it is excessive and not warranted by the law and testimony in this case.

- .) Because the verdict is contrary to law, evidence gainst the weight of the evidence.
- Decause the court committed error in giving the ring charge to the jury in writing, at the request of diff's counsel, without qualification thereto: "A rail-company is bound to use ordinary care in the running trains, to prevent them from coming in collision with erson of another, and this it is bound to use, even if other is, on his side, in some degree negligent, therefore the company by the use of ordinary care might prevented, the company must make good the damage." It motion was overruled, and defendant excepted is case has been tried three times. On the first trial, any found for the plaintiff \$10,000.00. A new trial granted by the Supreme Court (See 64 Ga., 475). On
- R. LAWTON; J J. JONES, for plaintiff in error.

on the present trial, \$11,500.00.

M. ROGERS; E. L. BRINSON; GIBSON & BRANDT; L. E. KLEY, for defendant.

econd trial, the jury found for the plaintiff \$12,500.00,

, Justice.

nat rights and powers have railroad companies over racks and road beds upon which their trains are run; rowing out of these rights, what duties do they owe public; and especially, what are their obligations to to the safety and protection of persons using their and the embankments upon which they rest, witheir express license, for purposes other than those cond with the business they were created and authorized mach? These are the questions made by this record, hich both parties have urgently and earnestly invoked lecide. We have held them over for a considerable

length of time, that we might give them such consideration and investigation as their importance to these corporations and the community at large demands.

1. While it may be impracticable, if not impossible, to lay down any general rule which will cover every conceivable violation of right or breach of duty that may arise from the negligence of each of the contending parties, yet there are certain fundamental principles, as clear as axiomatic truths, that stand in no need of argument or illustration, to secure their recognition or to enforce their application, which directly relate to the issues with which we have now to deal. Among these is the well established rule that such corporations, for the benefits and privileges conferred upon them, owe important duties to the public which they are strictly enjoined to perform, and to enable them to perform such duties, they are entitled to the unobstructed use of all the means which the law places at their disposal for that purpose. In Cauley vs. The Pittsburg, Cincinnati & St. Louis Railway Co., 95 Penn. St. R., 398, the supreme court of that state upon these questions thus declares the law: "It was said by Mr. Justice Strong in Philadelphia & Reading R. R. Co. vs. Hummell, 8 Wright, 278: 'It is time it should be understood in this state, that the use of a railroad track, cutting or embankment is exclusive of the public everywhere, except where a way crosses it.' The same doctrine has been reiterated again and again in subsequent cases. In Mulherrin vs. Delaware, Lackawanna & Western Railroad Co., 31 P. F. Smith, 366, it was said, except at crossings, where the public have a right of way, the man who steps his foot upon a railroad track, does so at his peril. The company has not only a right of way, but it is exclusive at all times and for all purposes"; and Railroad vs. Norton, 12 Harris, 465, was cited in support of this rule. Many other cases might be referred to, were it necessary. We live in an age of steam and of rapid development. The world demands quick trans-Increased speed necessarily involves increased

Holding, as we do, such corporations to a strict reility for negligence, it is our duty to give them a ack. This rule is not only proper in itself, but is ry for the preservation of life. Its propriety is er a subject for discussion." far as this decision is confined to the right of the company to the exclusive use of its tracks, l embankments, and to its liability for a failure or to perform its duties strictly, it meets our approval; cannot go to the extent of freeing the company responsibility for any damage that its agents may ly or wantonly inflict upon a person trespassing property. The extent to which this rule is imlaid down here is subject to important modifica-In Illinois Central Railroad Company vs. Godfrey, R., 500, it is held that "the right of way of a railmpany is its exclusive property, upon which no orized person has a right to be, for any purpose, person who travels upon the right of way of a railnpany, for his own convenience, as a footway, and any purpose of business connected with the raila wrong-doer and a trespasser;" and if he is ina passing train, under these circumstances, "the y, can only be held liable for wanton or wilful insuch gross negligence as evinces wilfulness." ng this principle as to the right of the company to usive use of its track, etc., except at crossings, it follow that, because a person thus wrongfully is right of way, is a trespasser and a wrong-doer, by becomes "altogether an outlaw," to whom the y owes no duty whatever. As the common law, of gross negligence or carelessness on the part of charge of the train, they are held liable for an inlicted even upon a trespasser. 6 Am. and Eng. ses, 1-17, and note to last page, which collects and s many of the American cases upon this subject, as upon the liability of the company, where the in-

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jury appears to be a mere wanton or malicious act upon the part of an employé, "acting at the time within the scope of his duty."

3. While the foregoing rule as to the amount and character of negligence which is required to render the company liable for an injury to a trespasser upon its road is upheld by a great preponderance of common law authorities, both in England and America, yet there are not wanting cases, especially in this country, which apparently hold it to the observance of much more diligence and caution in the prevention of such casualties, than is here demanded. "These cases," says the annotator of 6 American and Eng. Rwy. Cases, ut sup., "seem to indicate that ordinary care will be exacted, and that, in the absence of such care, the company will be held liable." This is a guarded statement. It is not asserted positively that this rule is laid down in any of the cases, but that they seem to indicate it. One of the cases relied on for this indication of the rule is the Illinois Central Railroad vs. Godfrey, which, as we have seen, attaches this liability "to wanton or wilful injury, or such gross negligence as evinces wilfulness." It is true that the court, after announcing this rule, does go on to say, "if the defendant's servants who were in the management of the engine, after becoming aware of the plaintiff's danger, failed to use ordinary care to avoid injuring him, the defendant might be liable; and this, as we conceive, is the only measure of liability, under the facts of this case," etc.

This, we apprehend, is the extent to which the other cases cited in the note, have gone. Certain it is that our own court has gone no further, for in the case of Baston vs. The Georgia R. R. Co., 60 Ga., 340, Jackson, J., delivering the opinion of the court, says: "Even a trespasser upon the track of a railroad, is entitled to be protected from gross negligence. Human life is sacred, and if a human form appear upon the road, walking, or sitting, or lying down, some effort should be made to save life." There

othing inconsistent, in this additional specification, rule for fixing liability laid down in the case, for gineer, after perceiving the plaintiff's danger, had use every exertion to avoid injuring him, then it clear to us that his failure, if it did not amount to and wilful wrong, was such gross negligence as was unt to wilfulness. Indeed, it would have been and, according to our Code, would have renm liable to prosecution for an offence against the code, §4586 (b).

iew here presented, accords, with one important tion, with the several provisions of our own Code subject, especially sections 2972 and 3034, which the principles of the common law as declared by ions of this court, rendered previous to its adoption, th, so far as we can understand, have been followed esequent decisions, including the case now under tion.

rst of the above sections will be found in Ch. II., of the Code. The subject of this title is, "Torts, or to persons or property." Chapter II., under which on is found, treats of "Injuries to the person," e remaining section is to be found under Ch. III., of the same title, which treats of "Injuries by Companies." By section 2972, it is provided: plaintiff, by ordinary care, could have avoided the ences to himself caused by the defendant's neglie is not entitled to recover. But in other cases, cases other than those in which, by ordinary care, I have avoided the consequences, etc.,) the deis not relieved, although the plaintiff may in some e contributed to the injury sustained," while sec-4, enacts that "no person shall recover damage ailroad company for injury to himself or his propere the same is done by his consent, or is caused vn negligence. If the complainant and the agents mpany are both at fault, the former may recover,

but the damages shall be diminished by the jury in proportion to the amount of default attributable to him."

Both branches of the rule of liability, as laid down in these sections of the Code, are traceable to, and derived from, decisions of this court, made prior to the adoption of that body of laws. As to the first branch of the rule. see, among other cases, M. & W. R. R. Co. vs. Davis, 18 Ga., 684; Central R. R. Co. vs. Davis, 19 Ib., 437; and as to the second, relating to contributory negligence, M. & W. R. R. Co. vs. Davis, 27 Ib., 113, and Yonge vs. Kinney, 28 Ib., 111. In M. & W. R. R. Co. vs. Johnson. 38 Ib., 431 and 432, this court recognized the view here presented as to the origin and source of the law as embodied in these sections of the Code. Subsequent decisions have not deviated from this line, as to liability for negligence. In Vickers vs. The Atlanta and West Point Railroad, 64 Ga., 308, Bleckley, J., said: "Whether it," (the presumption which, under Code, §3033, imputes negligence to the company, upon the proof of the injury, and requires upon the part of its agents, the exercise of "all ordinary and reasonable care and diligence"), "is overcome or not. if the plaintiff either caused the injury, by his own negligence, or could, by ordinary care, have avoided it, the verdict should still be for the company." In a case where the injury was to personal property, the same learned judge (in Geo. R. R. & Bkg. Co. vs. Neely, 56 Ga., 543,) after citing Code, \$\$3033, 3034, used this language: "If the plaintiff consented to the injury, the matter is plain. If his own negligence was the sole and only cause of it, there is still no difficulty; for the establishment of that affirmative either negatives the fact of negligence on the part of the company's agents, or renders the fact imma-Of course, however negligent these agents may have been, if the plaintiff's negligence was the sole cause of the injury, their negligence was no part of the cause; hence, its immateriality." And in a subsequent part of the same opinion, comparing these sections of the Code

972, and considering how far that is applicable to juries than those to the person, he says, p. 544, of ter section: "It applies, in terms, to personal inand if its meaning can be extended to injuries g property, it would seem to be applicable only he plaintiff's duty is to act after the defendant's nce has commenced and become apparent. When sequences of a present or antecedent negligence are ing, whoever can shun them by ordinary care and do so, ought not, perhaps, to be heard to complain , whether they touch his person or his property." W. R. R. Co. vs. Johnson, 38 Ga., 431, McCay, king for the court, applies the rule denying a right ery to the plaintiff, if, by ordinary care, he could oided the injury to himself caused by the defendgligence, to railroads as well as to natural persons, racterizes it as a wise as well as a just rule. He at "the man who neglects ordinary care to avoid y, has no just right to seek redress, if that injury ced by the negligence of another, and we see nothne character of a railroad company which should it to damages for an injury caused by the neglect of ts, where the person injured might, by the exercise ary care, have avoided the consequences to himself." present case, the question here made is res adjudil is not open to review. 64 Ga., 475. It is there stated company may relieve itself of damages by showits agents have exercised all ordinary and reasone and diligence to avoid the injury; or it may show damage was caused by plaintiff's own negligence; y further show that the plaintiff, by ordinary care, ve avoided the injury to himself, although caused efendant's negligence.

at be further borne in mind that, by Code, §3033, umption of negligence is, in all cases (except ught by employés, Code, 3036), against the comhere it is shown that the damage complained

of has been done "by any person in the employment and service of the company." This rule, (omitting the foregoing exception), like the others, is taken from the common law, as might be shown by a reference to the numerous text writers and cases on the subject. In N. J. Ex. Co. vs. Nichols, 33 N. J. R., 439, the supreme court of that state held, "that the plaintiff was not, as a condition precedent to maintain his action, bound to prove affirmatively that the injury was contributed to by his own negligence, under the penalty of a nonsuit." If, however, the plaintiff's own testimony shows that the damage was caused by his own negligence, or that, by the exercise of ordinary care, he could have avoided it, the defendant, in order to defeat a recovery, would not be bound to make these facts more apparent by the production of additional testimony. Tested by these rules. is this a case in which a recovery was proper?

The plaintiff was not an infant of tender years at the time of this casualty. He was over fifteen years of age, fully capable of perceiving and appreciating the perils of the situation in which he placed himself; he was in a place where he had no business to be; the place was at all times dangerous, and under the circumstances of this transaction, peculiarly so. He was there for his own pleasure and convenience, not for any purpose of business with the company or its agents. He was not there either by the express license or encouragement of the defendant or He saw the train more than or any of its agents. a quarter of a mile off, approaching at a rapid speed; he leisurely pursued his walk, meeting it, and remained on the track until it came very near him, when he got off upon the narrow path that runs by the side of the superstructure on which the rails were placed. This path was not more than four or five feet wide, perhaps not so wide. Another person, Rosa Silverburg, occupied a portion of it, and the plaintiff was standing between her and the train; there was no obstacle to prevent these parties.

they left the track, from getting further from the g train; the embankment, at the spot, was neither or steep; it sloped gradually, and could have been ded without inconvenience or risk; the plaintiff in the path where he first got upon it, until a conole portion of the train passed him; he had ample o have gone farther. These are the unquestioned as shown from his own evidence. To them, should led the further fact, as appears from the defendant's ony, and which was not contradicted or explained, gh if if had been possible to do so, there was ample tunity afforded, that plaintiff had, before this occurbeen in the habit of remaining on the track, while were running, until they got very near him; that, on casion, the section-master, while using a pole car, overim, and he stayed on the track until the car got very o him, and the section-master "complained of his bethe way; did not exactly stop the car to get him the way, but had to slacken speed; complained to wice, though he had only to slacken speed once; im on the track several times." The plaintiff was ware that these cars passed the place at or about the when this accident occurred. Now, upon every prinof law applicable to the subject, this conduct was ps nothing short of culpable negligence, even in one vas rightfully on the track, and it might and could been easily avoided.

such a position, the plaintiff should have been watched careful, and a want of this watchfulness and care is him chargeable with negligence. "Slight circumses may over-balance the presumption of freedom negligence which we suppose to exist in favor of a tiff. Thus, his being found in a position of danger plained, or his free use of intoxicating liquors," etc., by evidence tending to show careless habits, should the scale." Shear. & Redf. Neg. §45. "The rule of nce, says Lumpkin, J., in Macon & W. R. R. Co. vs.

Davis, 18 Ga., 685, "will vary with the ever-changing facts which accompany and surround each given case; the true test, always to be applied, being, did the defendants use reasonable diligence; that is, the care and diligence which, taking into consideration all the circumstances of the case, the exigency required and admitted of ?" "Ordinary care, however, as the phrase is here used, implies the use of such watchfulness and precautions as are fairly proportioned to the danger to be avoided, judged by the standard of common prudence and experience. If the danger is remote or slight, the care required to avoid it may be slight; if the danger is near and extraordinary, extraordinary vigilence should be used to avoid it, because such would be the course of a prudent man." Shear. & Redf. Neg., §30. "The probability of danger" is always "to be taken in view in determining, not merely the grade, but the existence of negligence." Wharton Neg., §47.

It would be a mere superfluous task to cite further authorities to a principle so fundamental in its nature, and one which the common sense and experience of mankind will readily recognize and appreciate.

Parties have an undoubted right to the use of public crossings over railways, but before going on these crossings, they should exercise caution and look out for danger; and, as a general rule, a failure to observe these precautions, where an injury is the result, may deprive them of the right to recover, even if the defendant has been remiss in making use of the ordinary signals of warning and other expedients, as the ringing of bells, the blowing of whistles, the slacking of speed, etc., for avoiding casualties. Especially is this so, if the injury was not occasioned by this omission of duty, and would have occurred if it had been fully and faithfully observed.

These questions have very recently undergone thorough examination, and have been very fully discussed by the supreme court of North Carolina, in the case of Parker, adm'r, vs. Wilmington and Weldon R. R. Co., 86 N.C. Rep.,

8 Am. and Eng. R. R. cases, 420). Smith, C. J., deng the opinion, says: "The only possible imputation. the prudent conduct of the engineer is in the omiso give the warning in season to keep off persons to cross, but even this does not dispense with all nal attention to one's own safety. If the omission glect in the company, much greater is the neglect of eceased, who, when aware of the runnings of the ar trains, and just when one was expected, walks and ns upon the track without looking out for its aph, or making any movement to get out of the way, rushing on, it strikes him to the earth. It is to be med that a rational being will not needlessly venture laces of peril, and if he does, that he will use proper ations to guard against injury. If he fails to do , and suffers damage in consequence, it must be red as caused by his own rash act and inattention tovn security."

egligence is a relative term,' remarks the supreme of New Jersey, in N. J. Ex. Co. vs. Nichols, 3 Jersey, 439, "depending upon the circumstances which the injury was received and the obligation rests on the party injured to care for his personal

A person crossing a railroad track, though righthere, must be on the alert to avoid injury from trains any happen to be passing.

he company's servants may ordinarily presume,' is neclusion derived from an examination of numerous by a recent author, whose work exhibits large reand precision of statement, "that a person of full d capacity who is walking on the track at some discefore the engine, will leave it in time to save himom harm; or, if approaching the track, that he will it becomes dangerous for him to cross it. This preson may not be justified, under some circumstances, in the person on the track appears to be intoxicated, or otherwise off his guard.' Pierce on Railroads, 331.

utory negligence,' says the same author, 'is that a person cannot recover for an injury to which he contributed by his own want of ordinary care.' Ib., 323. The only culpability which can be charged upon the company is the failure to give the precautionary signal of the approach to an intersecting way, where travellers might be expected to be found, and thus prevent their moving upon the track; but this omission, when in no manner causing or contributing to the injury, does not impose a liability upon the company. If the traveller knew by other means of the coming train, the omitted warnings could not be deemed the cause of the collision. Ib., 351.

"But, without accumulating references to the numerous decided cases, of which the defendant's counsel has furnished us many very much in point, we prefer to rest our decision upon the authority of a recent case, clearly resembling that before us, and in which a large array of cases was brought to the attention of the Supreme Court. Railroad Company vs. Houston, 95 U. S. Rep., 697. Mr. Justice Field says: 'If the positions most advantageous for the plaintiff be assumed as correct, that the train was moving at an unusual rate of speed, its bell not rung, and its whistle not sounded, it is still difficult to see on what ground the accident can be attributed solely to the negligence, unskilfulness or criminal intent of the defendant's Had the train been moving at an ordinary rate engineer. of speed, it would have been impossible for him to stop the engine when within four feet of the deceased. \* \* The failure of the engineer to sound the whistle, or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employés in these particulars was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of danger. Had she used her senses, she could not have failed both to hear and

ee the train which was coming. If she omitted to use n, and walked thoughtlessly on the track, she was ty of culpable negligence, and so far contributed to injuries as to deprive her of any right to complain of ers. If, using them, she saw the train coming, and yet ertook to cross the track, instead of waiting for the n to pass, and was injured, the consequences of her take and temerity cannot be cast upon the defendant. railroad company can be held liable for a failure of eriments of that kind." a Southwestern R. R. vs. Johnson, 60 Ga., 667, this t held that where the plaintiff's husband, at the he was killed, was lying upon the defendant's road track, where the public road crossed the e. she could not recover, although the defendant as negligent in not blowing its whistle at the proper at crossing the public road, and checking up its train ars," because the deceased, "according to the evidence, d, by ordinary care, have avoided the consequences to self caused by the defendant's negligence." It cannot claimed in this case, that the plaintiff's injury was sed by the unusual speed of the train, or by the failure he company's agents to blow the whistle or ring the , for the plaintiff had seen the train a long distance and appeared quite indifferent as to its approach, he her felt nor manifested any apprehension of danger n a collision, he leisurely pursued his way until it came te near him. When he got upon the side path, he did get far enough from the cars to prevent his being cken by a plank or piece of timber projecting some six ight feet beyond the side of the platform car, but was, e insists, at a sufficient distance to avoid collision with cars. This was the only negligence, if negligence it be considered, on the part of the defendant, to which

can attribute the injury he received. The evidence res it very doubtful whether the injury could have n caused by a blow from this plank or timber. It proved so far beyond the place where he was standing, that

the end of it could not have scraped the side of his jaw. even though he threw his head back when he saw the projecting plank. According to his own account, he was three feet from the track at that time, and the plank projected six or eight feet from the car; the blow, which was a "glancing blow" and "just did scrape his jaw," had sufficient force to "knock him down," and to draw him under the wheels of the passing car, which inflicted upon him the serious injury that maimed him for life. It is probable that he is mistaken as to the manner and source from which he received this injury. A blow from the plank might have thrown him from, instead of under, the train, according to the angle made by the projection, as to which there is no proof. If the plank had projected only six feet, and he was three feet from the track, then he must have been stricken about midway the distance it projected. The persons on the train place him much nearer the cars than three feet, and their version of the affair seems well sustained by the circumstances attending the catastrophe. It is not improbable that he came in collision with the stirrup that held the standards on the car, and that the collision thus brought about threw him under the train, and caused the injury; his companion was standing further from the cars than he was; she was on the outer part of the path, and a "little in front of him," and received no injury. True she was not as tall as he was, but the evidence does not show the difference in their height, or whether she was tall enough to have been reached either by the side of the car or the plank resting on and projecting from Besides, if the damage was done by this plank or piece of timber, it appears to us, that it would, in all probability, have been fatal, for when it came in contact with an upright iron switch, a short distance from the scene of the disaster, the collision was so violent that it shattered the switch, and left a deep dent in the timber itself. This casualty, we apprehend, should be attributed to the plaintiff's temerity. He should have left the track some time be-

s the other children then on it much more prudently hen he would have had ample time and opportunity e looked about him and to have avoided the danger. ing the approaching train, and knowing the danger eting it, as he must be presumed to have done, ed to see how near he could get to it without injury, fendant should not be held responsible for the result experiment; and if, when he did leave the track, he a mistake as to how near he might stand with safety nself, surely the railroad company should not be ed with the consequences of this mistake. ed, however, by the defendant, and we think rightly, his party was ab initio a tresspasser upon its track mbankments, and was such as long as he remained and while it is conceded that it would be liable for ton or wilful wrong of its agents, acting within the of their duty, or even in cases of gross negligence elessness, evincing reckless disregard of the safety of , or where they perceived the danger of a party in and made no effort to avert it, yet it maintains that inder no such obligations to trespassers as to those re properly and lawfully upon its premises, for the se of either transacting legitimate business with it, furtherance of rights reserved to them by law. riew of the fearful frequency of the unauthorized use

road tracks and embankments as foot paths, and of prils to which pedestrians, as well as the trains them, the persons managing them, the passengers and ts with which they are loaded, are constantly exfrom this highly reprehensible practice, it may be o state at greater length than has already been done lative rights and duties of parties to suits brought dress of injuries happening under such circumstances. It case of Mulherrin vs. Delaware Lack. and W. R. Penn. St., 366, already referred to, the supreme of Pennsylvania says: "The company have not a right of way, but such right is exclusive at all times

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and for all purposes. This is necessary, not only for the company's rights, but also for the safety of the travelling It is not right that the lives of hundreds of per. sons should be placed in peril for the convenience of one single fool hardy man, who desires to walk upon the track. In England it is a penal offence for a man to be found unlawfully upon the track of a railroad (3 and 4 Vic., Ch. 97, §16). It would add materially to the public safety, were there a similar law here." It would be a striking anomaly, were railroad companies held to the same measure of care for the safety of mere wrong-doers as for those engaged in their service, or placed under their care, or who are authorized by the law to use the crossings over their tracks, or to visit their stations or other portions of their road upon business connected with them; but the law tolerates no such absurdity; it recognizes and enforces a clear distinction in this respect as to these different classes of persons. It requires diligence in proportion to the duty imposed, and the degree of negligence imputed must correspond to the degree of diligence exacted. Wharton Neg., §48. "In determining the care and diligence to which any one is bound, it is necessary to distinguish first between the obligations of persons who do, and of those who do not stand in peculiar relations to one another. It is the duty of every man to conduct himself, and to manage his property with ordinary care and diligence, and with no more than that, unless he has increased or diminished his responsibility by assuming some special relation with the person who seeks to enforce it. But if one does an act of pure favor for another, with the assent of the latter, his responsibility to him is reduced to the duty of merely slight care and diligence, to which extent, however, he is bound. And on the other hand, the party receiving the favor is bound to exercise great care and diligence therein for the benefit of the party conferring it." Shear, and Redf. Neg., §22; Central R. R. vs. Henderson, decided at this term. But as "the common law has a peculiar regard

nan life, and for this reason exacts a greater decare when life is at peril than in relation to any of mere property, it requires from all persons, inthose who render gratuitous services, at least ordire for the safety of life" Ib., §24. There is cerdifference as to the degree of care to be observed company's servants to one who avails himself of a ous privilege and a wrong-doer. The case of Illinois Railroad Company vs. Godfrey (71 Ill., 507), taken ection with the foregoing, will make this distinction "Where both parties are equally in the position , which they hold independent of the favor of each he plaintiff is only bound to show that the injury duced by the negligence of the defendant, and that cised ordinary care or diligence in endeavoring to But where the plaintiff is himself in the wrong, n the exercise of a legal right, or was at the time g a privilege or favor granted without compensabenefit to the party granting it, and of whose cares complaint is made, he, the plaintiff, must use dinary care, before he can complain of the negliof another. Aurora Branch Railroad Company vs. , 13 Ill., 585." To the same effect is Shear. and Neg., §491, and cases cited in notes there.

do the cases determined by our own court accord less views and principles? In an early case (Flance Meath, 27 Ga., 358), the plaintiff, a child of tenars, was seriously injured by a dray passing down eets of Macon, at a very rapid rate. There was a which plaintiff attended, just opposite her parents' ace and the place where the injury was inflicted; in the street the school children were in the habit ying. On this occasion a rain was coming up, and any was partially loaded with meal and flour; the first in front of the mules, passed their heads, and aught under the hind wheels and injured. She had in the habit of thus running before passing drays and

other vehicles on the streets, and came near being hurt on several occasions previously. Her parents were informed of this and told, if they did not keep her out of the streets. she would some day be injured. The jury found a verdict of \$50 in her favor, a new trial was moved for and granted, because of the inadequacy of the dam-This court reversed the judgment granting the new trial, and held that, notwithstanding the jury might think the person injured altogether in fault, yet, if from pity, or any other consideration they should return a verdict for damages, and the defendant acquiesced in it, the plaintiff could not complain and demand a new trial, although her injury was serious and the damages found were almost nominal: thus clearly intimating that had the defendant sought to set aside this verdict by moving for a new trial, his motion should have been granted. In Sins vs. Macon & Western Railroad Co., 28 Ga., 93, the plaintiff's slave, who was killed by the train, had seated himself upon the end of a cross-tie; the train was visible at the distance of 1000 yards; the negro had probably fallen asleep, and neither saw nor heard the approaching train. The engineer did not blow the whistle, nor did he slacken his speed at which he was running until he got too close to avoid the collision. Under these circumstances a nonsuit was awarded, and properly so, as this court held. The conduct of the negro was deemed "gross negligence," which deprived the plaintiff of his right to recover dam-Benning, J., who delivered the opinion, said: ages. "Whether the negro was awake or was asleep, we cannot But, at first, the engine man had the right to presume he was awake. He was sitting up, not lying downsitting on the end of a cross-tie. This commonly is the attitude of a person awake. The engine man, then, had, at first, the right to presume the negro to be awake. And whatever presumption he had the right to make, he had the right to act on." Again in another part of the same decision, this able and enlightened judge declares,

on on a railroad track, as a trespasser, is aware of the oach of a train, it is his duty to get off the track, out ne way of the train, and it is not the duty of the enman to stop the train, or even to blow the whistle; inly it cannot be his duty to blow the whistle until rain has come almost quite up to the person. Of what could it be? This, I suppose, will not be disputed." o. West. R. R. vs. Hankerson (61 Ga., 114), Hankerwas lying on the track, just beyond the crossing, in a of insensibility, whether from drunkenness or a sudaccession of disease, the evidence leaves in doubt; he seen by the engineer at the signal post, who mistook for a hog that had been killed by a freight train just d of him; did not discover that it was a man until ot within 100 or 125 yards of him, when he immediused all the appliances at his command to awaken and to stop the train, but did not succeed; the train over and injured him. Warner, C. J., said in deliverthe opinion of the court: "If the plaintiff was voluny drunk, and in that condition placed himself on the ndant's railroad track, he was not entitled to recover l, under the provisions of the 2972 section of the Code, ther the defendant was negligent or not. But if he not drunk, and could not have controlled his powers ecomotion from a sudden attack of disease or other luntary cause, and in consequence thereof was involrily upon the defendant's railroad track, then the quesof negligence might have arisen under the provisions ne 3034th section of the Code." In The Georgia R. & Bkg. Co. vs. Nasby, 56 Ga., 540, a verdict given on unt of contributory negligence in the killing of a mule crippling a colt by the train of defendant, under the wing facts was set aside by this court: The plaintiff, lived near the railroad, hobbled the mule, and turned nd the colt out at night to graze; they got upon the k, and were seen ahead of the train, as far as the head t would enable the engineer to perceive them. He used v 70-16

all the means in his power to stop the train, but could not do so, on account of being on a down grade, nor was he more successful in frightening them from the track by the use of the whistle. Bleckley, J., delivering the opinion, said: "On scrutinizing the evidence before us, we are of opinion that the company's agents were not wanting in ordinary care or reasonable diligence; and that the verdict which was rendered on the basis of contributory negligence cannot be upheld. The evidence is not conflicting or inadequate. The burden of proof, cast by law on the defendant, has been removed."

So too, in the case of Vickers vs. The A. & W. P. R. R. Co., 64 Ga., 306. Where a child of ten years of age was allowed, with others, by the defendant's employés to get on and jump off the cars while in motion, and the engineer in charge, only one or two days before the injury occurred, put the plaintiff on the engine while in motion, and then and there bought ground-peas from him, for which he did not pay, and told him to come back for his pay on the day of the injury, and plaintiff, in compliance with the request, returned, and in jumping on the engine while in motion, fell through, and the train ran over his leg and crushed it, so that amputation was necessary, and the court below awarded a non-suit, this court, reversing that decision, held that where the law raises a presumption of negligence against the defendant by reason of the mere fact that the physical injury was inflicted by means of running its locomotive, and where, owing to special circumstances touching the conduct of the engineer toward the plaintif, a child of only ten years of age, it is not altogether certain that the presumption is rebutted; and where on account of the plaintiff's tender years and his consequent immaturity of understanding, he is not amenable to so high a standard of diligence in regard to his own safety as that which adults are obliged to observe, the case made by the plaintiff's evidence is more properly one for the jury than the court, and a motion for a non-suit should be denied

liscussing the propriety of this non-suit, Bleckley, J. arks: "The present is not quite a case for a non-suit." igh its neighborhood to that class seems very near." our case, the injured party had attained an age (fifteen) en by law the immaturity of his understanding was not be presumed as freeing him from the consequences of own voluntary act, Code, §4294; but under ten years. between that and fourteen, the presumption is othere; he is not to be held accountable unless he knows the inction between good and evil; or at or below ten rs of age, unless it be shown from the evidence that he impressed with a sufficient sense of moral obligation." s "possessed of sufficient capacity to have deliberately mitted the act with a full knowledge of its consequen-" Ib., 4295. While this section of the Code relates to an ant's accountability for criminal offences, yet in cases of the is equally responsible, provided he has reached se "years of discretion and accountability" prescribed the Code for such offences. *Ib.* §3064.

But the difference between this case and the one under mination does not end here. In Vickers' case, the boy en was invited on the engine, while it was in motion, the man having charge of it; in this, no such invitation or inducement was held out. On the contrary, comint had been made, by at least one of the employés of road, of his intrusion upon its track and embankment. But it was urged by the distinguished counsel for the intiff, who, when on the bench of the superior court, ermined the case of Baston vs. The Georgia R. R. Co., orted in 60 Ga., 339, that the present case is precisely hin the rules laid down by this court in that, in reversithe judgment awarding a non-suit by the lower court. It is respectfully differ from our learned brother; the cases essentially different in most of their features.

Ve do not intend, by anything we have said, to intimate opinion, whether a non-suit in this case would have in proper. No such question was made in the lower

court, and we abstain from going outside the record to search for points, which may possibly not arise in the further progress of the litigation, and by anticipation, to forestall their discussion and investigation. When this question shall properly come before us, if it ever does, it will be time enough to determine it. In that case, the plaintiff was upon the defendant's line of railway by its consent, walking on the track at a certain point, about nine o'clock at night; when the train came behind him in the dark, he stepped six or seven feet from the track,-far enough ordinarily to be secure from danger from the running of a train, but was prevented from going further by a hedge or thicket of briers left growing on defendant's right of way; several trains passed him in safety to himself when a piece of timber, projecting from one of the rear trains, struck him on the head, felling him to the ground and injuring him seriously; this injury was the result of gross negligence on the part of the defendant in loading its cars with freight in such an unusual manner, and in permitting the piece of timber to project so far off of the track of its road. Jackson, J., delivering the opinion, remarked: "Taking these allegations to be true, the plaintiff would be entitled to recover. Even a trespasser upon the track of a railroad is entitled to be protected against But this is the case of a man gross negligence. . . . . going from one point to another on the track of the road. by its consent, and who, therefore, is not a trespasser, but was entitled to greater consideration than a mere trespasser would be entitled to claim." The judge then goes on to show that these circumstances, all taken together, as we understand the decision, made out a case of gross negligence on the part of the defendant.

Now, mark the difference between this case and that under consideration. In the latter, there was no consent upon the part of the company, either express or implied, that the plaintiff should use the road in the manner he did. It was not pretended that there was any express consent;

but an attempt was made to imply consent from the frequent use of the track and embankment by the plaintiff and others, in a similar manner and for like purposes, without effort on the part of the defendant to prevent it. In this case, the plaintiff was on the track in the day time; in that, in the night. In the one, anything that threatened danger, as the projecting timber, was plainly visible to one on the alert and making proper use of his senses; in the other, on account of the darkness, it was not discernible, however vigilant the plaintiff might have been. In the one, there was no obstacle to prevent the party from going further from the passing train; in the other, there was, and that obstacle was allowed by the company In the latter, it appears positively that to remain there. the train was negligently loaded, and that, by means of this negligent loading, the timber which did the damage projected an unusual distance from the car, over the track; whereas, in our case, the train was examined upon starting from McBean's station, thirty miles off from the place of the accident, and found in perfect order. It was not a loaded train, and the piece of plank or timber that was alleged to have caused the injury was not seen to project, until within about two miles of Lawtonville, where an attempt was made to call the attention of those in charge of the train to the fact; but the signal given was not un-The inference is clear that, in starting, this piece of timber was in its proper place, and was jostled out of position during the run, and was not discovered by the train hands in time to replace it. The empty train was going for a load, and did not stop at the customary In Baston's case, it must be taken as true that stations. the injury complained of was certainly done by the projecting timber; while in this, the probabilities are that it was not done in any such manner, but by contact with the In that case, timely effort was made, and the party got a reasonably safe distance from danger, under ordinary circumstances, at least as far as he could go without run-

ning into the thicket of briers; in this, there was no effort made to escape danger, until the train was close up to the plaintiff, and then he did not leave the track further than three feet, although there was nothing to prevent his going further and beyond the reach of all danger. In that case, as before remarked, the plaintiff, from the darkness of the night, by the use of the utmost vigilance, could not have perceived his danger, and made proper effort to avoid it; but this damage occurred in the broad light of day. If any, the least, vigilance had been used, the projecting plank could have been seen; and when seen, contact with it might have been avoided by stooping low or sitting down, if not by a retreat down the embankment. some evidence in the record, it seems that the attention of the plaintiff was, at that time, fixed on the carwheels rather than upon the body or bulk of the train or its load.

6. Whether the consent of the company can be implied from such use of the track by unauthorized persons as that set up in this case, has been seldom directly passed upon by our courts, so far as we can find; but it has been repeatedly passed upon by the courts of some of our sister states, and by them settled, upon principles, as it seems to us, too clear for doubt, some of which we have already discussed, as those relating to the company's right to the exclusive use of its road-bed, embankments and cuts, and the obligation and duty of others to abstain, without its consent, from their use, except at crossings, where the public have a right of way.

To consent is one thing, and is quite different from mere forbearance, on the part of the defendant, to seek redress, whenever its rights are temporarily invaded by a wrong-doer. By endurance or toleration of a trespass, we do not understand that any of a party's privileges and rights are necessarily waived or yielded, or that it ceased to be entitled to the protection afforded by the law. By direct consent to the use of its way, it certainly waives any right

roceed against one thus found thereon, for any wrong may be imputed on account of such use. There can o right set up by the public from mere user, however gent or long-continued it may be. It is so inconsist with the rights and obligations of the company that it ot, without more, be presumed to have consented to east of all, can it be claimed, with any show of reason, the right of the public has, by such facts, become ade to the right of the owner of the road. That this ad e holding is essential to the right set up here, and ch it is insisted the defendant was bound to respect, that it must be derived from the consent of the owner. Irwin vs. Dixion et al., 9 Howard R., 10. It is not beed that any length of forbearance to take legal proings against trespassers, or to warn them from the on which a railroad track is constructed, will amount dedication of the same to the use of the public, as a for pedestrians. No such case has been brought to attention, and our own research has discovered none. ich a one existed, we are satisfied that it would be in ct contradiction to principles too long and too firmly blished to be called in question at this late day. "If the er of lands," declares our Code, §2684, "either exsly or by his acts, dedicates the same to public use, the same is used for such a length of time that the lic accommodation or private rights might be matey affected by an interruption of the enjoyment, he not afterwards appropriate it to private purposes." Then a railroad company, by authority of law, goes into session of land for the objects of its creation, is not an appropriation to certain great specified public uses? l can it divert its use to purposes wholly inconsistent those which it is authorized to pursue,—purposes ch may imperil the lives and property of travelers and ghters on its trains, without incurring a forfeiture of privileges? To ask, it seems to us, is to answer these stions. Now would it be fair to presume that, from

its inability, or reluctance, from prudential or other laudable considerations to prosecute or warn off trespassers from its track, that it thereby consented to its appropriation to uses wholly inconsistent with its obligations and duties to the public? It might be sufficient to answer, that upon principle and authority, no such presumption arises. This conclusion, however, is fully sustained by the cases.

In the case of the Illinois Central Railroad Company vs. Godfrey, already referred to in this opinion, it is said, (71 Ill. R., 506): "The plaintiff was traveling upon defendant's right of way, not for any purposes of business connected with the railroad, but for his own mere convenience, as a footway, in reaching his home, on return after a search for his cow. There was nothing to exempt him from the character of a trespasser and wrong-doer for so doing, further than the supposed implied assent of the company arising from their non-interference with previous like practice by individuals. But because the company did not see fit to enforce its rights and keep people off its premises, no right of way over its ground was thereby acquired. It was not bound to protect or provide safeguards for persons so using its grounds for their own convenience. The place was one of danger, and such persons went there at their own risk, and enjoyed the supposed license subject to its attendant perils. At the most, there was here no more than a mere passive acquiescence in A mere naked license or permission to enter or pass over an estate will not create a duty, or impose an obligation on the part of the owner to provide against the danger of accident. Sweeny vs. Old Colony, etc., Rwy. Co., 10 Allen, 373; Hickey vs. Boston & Lowell Rwy. Co., 14 Ib., 429; Phila. R. R. Co. vs. Hummell, 44 Penn. St., 375; Gillis vs. Penn. Rwy. Co., 59 Ib., 129.

For all the purposes of this suit, the plaintiff stands in no more favorable condition than that of a wrongdoer and trespasser. He was not, at the time of the accident, in the

ise of a legal right, and was in the enjoyment of no than a bare license or assent tacitly given, and his and the obligation of the company are to be measured the case of one thus situated." In confirmation of uling, we cite Illinois Cent. R. R. vs.. Hetherington, ., 510; Finlayson vs. Chicago R. R. Co., 1 Dillon, Galena, etc., R. R. Co. vs. Jacobs, 20 Ill., 478; oft vs. Boston, etc., R. R. Co., 97 Mass., 276; Nichvs. Erie R. R. Co., 41 N. Y., 426; Sutton vs. N. Y. & H. Riv. R. R. Co., 66 Ib. 243; Matz vs. N. Y. Cent. Riv. R. R. Co., 1 Hun, 417. it the plaintiff was a trespasser, is equally as clear the Code as from these several decisions. "The right joyment of private property being an absolute right ery citizen, every act of another which unlawfully eres with such enjoyment is a cause of action. Code, . "Bare possession of land authorizes the possessor over damages from any person who wrongfully, in nanner, interferes with such possession." Ib., 3015. a, and still more pointedly, is the following: "The r of realty having title downward and upward indefy, an unlawful interference with his rights, below or the surface, alike gives him a right of action." Ib., . So, such an interference "with a right of way or mmon is a trespass to the party entitled." Ib., §3021. s not perceived how this principle can be affected by erence in locality, as in a town, city, village or county, the number of persons violating the right, or the ency or length of time in which it is violated by any of those taking such unwarrantable liberties. tances alter cases, but principles never; circumstances constantly, but principles are permanent and uneable, however numerous and diversified may be the to which they apply. In the case of the Illinois al R. R. Co. vs. Godfrey, the injury in question red in the incorporated town of Decatur. er of the inhabitants of that town were in the habit,

and had been for a long time, of using the railroad track there as the plaintiff used it when he was injured; an or dinance of the town required the slacking of speed and the use of cautionary signals when the trains were running through it, but which does not appear to have been done. It was held that no license could be implied from such customary use of the track, and the plaintiff could be regarded in no other light than a trespasser; and what is true of this case, is quite true of some of the others above cited.

The case of Holmes vs. The Central Railroad Company 37 Ga., 393, forms no exception to them, in any material respect. "The spot at which the engine killed the plaintiff's slave (in that case) was seventy or eighty yards from the public road; but it was on a part of the track used very much by foot passengers to make a short cut from one to another of the public roads which was known to defendant's agents. It was down grade at that point, and the view was there obstructed by a cut. The killing took place near midnight. The blow posts were not at such distance from the public crossings as was required by law, and it was doubtful, from the testimony, whether the engineer blew the whistle when he passed the blow posts. The engine was going at the usual speed at the time; the slave was on the track, but not standing up; the engineer did not see him until he was struck by the engine and then supposed he was a hog or a sheep."

Among other things, Judge Gibson, of the superior court, charged the jury "that the track of a railroad company is not a public highway; and persons who use the same in pursuit of their ordinary private business, except at a public road crossing, are actual trespassers;" and this court addressing itself to that portion of the charge said: "By the act," (regulating the conduct of trains at public crossings) "certain things were required to be done by railroads, and certain liabilities incurred, in case of failure. This act was intended for the protection of persons and

ty at public crossings of the road. The public have to cross the railroad track at the public road cross. When traveling the highway, persons are lawfully railroad track at the point of crossing; and if an is done at such public crossing, then the provisions act of 1852 become material. In this case, the nt having occurred elsewhere, the provisions of the e not applicable. The fact that so many persons ed on foot over the portion of the road where the was killed, did not make the railroad a public road." nection with this, and a little further on in the case, it, "The negro was on the road of the defendant at a where he had no right to be."

decision settles two pionts, viz.: that such use railroad track is a trespass, and that the consent of mpany thereto can not be inferred from its habitual though its agents were well apprised of the fact that thus used. It is true, in this case, that the judge lower court refused to charge, at the request of the ant's counsel, that the defendant was not liable, unilty of gross negligence, and that this court approved usal; but it is also true that this court held that the ial, setting aside the verdict in favor of the plaintiff, ry properly granted, on the ground that the verdict ainst the evidence. It would be a mistake to supnat the conclusion here is based upon the ground e defendant was not guilty of gross negligence, in solute and statutory sense of that term. Under the ous cases cited from our own reports, it is quite apthat complete protection is afforded the defendant, here it is shown that "all ordinary and reasonable d diligence" have been exercised; 2d, where the ff could, by ordinary care, have avoided the consees to himself, although caused by the defendant's ence; 3d, where the injury is done by plaintiff's t, or is caused by his own negligence.

e rules are taken from Code, \$\$2972, 3033 and 3034,

each of which is an essential part of an entire scheme. As whole, they relate to the same subject, are in parimeteria, and should be so construed as to harmonize the and at the same time to give effect to each particular portion of them. It should be observed that the judgment grantia a new trial, in the last cited case, was put upon section 3033 of the Code, and that the other two sections we neither cited nor commented upon by the judge delivering the opinion.

It has been shown, in the course of this opinio that even where the plaintiff could, by ordinary care, har avoided the injury caused by the defendant's negligence or where it is solely attributable to his own negligence yet if the conduct of the defendant was so grossly neglige as to evince wilfulness, or if he perceived the plaintiff's da ger in time to have averted it, and made no proper effort to so, then he would be liable for the consequences. This add tion is essential, as it seems, to carry into full effect the evident design of the Code, although that purpose ma not be therein expressed in terms. The term "gross ne ligence," used in connection with such circumstances, h a relative, rather than an absolute and strict signification and as thus used, is the equivalent of acts which resu from a failure to observe that "ordinary and reasonab care and diligence," prescribed by our Code. It was ce tainly used in this connection in all the cases herein cite including that of Baston vs. The Georgia R. R.

The complaint made in this case by one of the defendant employés to the plaintiff, and the warning thus given him the danger he incurred by using this track and embandment as a footway, deprives him of the right to complain of the injury he brought upon himself by his failure theed this friendly admonition and caution. Hughes a Macfie, 2 Hurlst., and Colt., 744. In Chicago and West. R. R. vs. Smith, 46 Mich., 504: "A child, eight years old, was injured by the sudden starting of a locometive, on the step of which he had been standing, and from

had just been ordered away by the fireman. He was

ser on the premises, had been warned against go-, and had more than ordinary intelligence. It that the company could not be made liable, withthat the employes knew that he was in the way ment, or were reckless or negligent in their manor could have anticipated the injury." This, we d, is a fair statement of the rule of the company's under the circumstances disclosed by the record , and we adopt it as our own. entral R. R. vs. Glass, 60 Ga., 441, bears no ree to the present case, and is wholly unlike it in terial features. Glass got on the cars of the dedrunk, with the knowledge and consent of its r. Failing to give up his ticket when called upon, earried past three stations, and when in threeof a mile, or a mile, of the fourth station, he was the conductor and brakeman, while still drunk, on kment, which was two hundred yards from a crossring that he would walk to Jonesboro, but started in ite direction. When he got about a mile off, he laid the track, and was run over and seriously hurt by ain from Macon to Atlanta. Although the conducngineer of this train had been notified that he off at this point by the down train, and to keep a lookout for him; they failed to do e verdict in his favor was properly sustained by court and by this court. Glass was rightly on that passenger, and was under the care of the agents d. If put off for failing to produce a ticket, he ave been ejected at some station or other safe nd in his then drunken and helpless condition, he ot have been dumped off without his safety being ter. The difference between that case and this is ked. Not to mention others, the plaintiff here lefendant's track, without the knowledge of its nd in defiance of their warning and request to

keep off the track. They had no agency in placing him there; whereas, in the other case, the plaintiff was place in his dangerous situation by the company's servants.

Believing that the defendant's conduct amounted to gros negligence, and that, by the exercise of ordinary care, the consequences to himself could have been avoided, it follows that this verdict should have been set aside and a new trial granted, upon the ground that the finding is contrart to law and evidence.

- 7. But this is the third finding by juries in this case. Onth first trial, the verdict was for \$10,000, which was set asid by this court, because of erroneous charges by the president ing judge; the second was for \$12,500, which was set asid for the irregular and improper conduct of a juror, and n writ of error was taken to that decision of the court below In the present trial, the finding for the plaintiff wa \$11,500, and a motion was made to set it aside and a new trial asked, among others, upon the ground that this finding is excessive, and not warranted by the law and the test mony in the case. If the plaintiff was entitled to recover at al he was only entitled upon the idea that the defendant ha contributed to the negligence that resulted in the injury for which he sought damages; indeed, this is the sole ground upo which his right was urged by his able counsel in this cour Under this view, this finding is so excessive as to lead to to infer if not bias for the plaintiff, and prejudice against the company, at least a total misapprehension by the trion of the principles of law which were given in charge by the judge trying the cause. Code, §§3067, 2947. The Savar nah F. and W. R. R. Company vs. Harper, decided at the term, in which the cases upon the subject are collected an reviewed.
- 8. Exception is taken to this charge of the judge give without qualification, at the request of plaintiff's counsel
- "A railroad company is bound to use ordinary care in the running of its trains, to prevent them from coming in collision with the person of another; and this it is bound

ren if that other is, on his side, in some degree negherefore, if damage happen to such other person ision, which the company, by the use of ordinary ht have prevented, the company must make good ge."

jected by defendant's counsel, that the case put, ly one of contributory negligence and that his honor ury, "the company must make good the damage," ch they were left to infer that they were at liberty e entire amount of the damage done to the plainout making any abatement for the negligence le to him. The error complained of is manifest. case 64 Ga., ut supra, and Code, §\$2972, 3034, cited in edition of 1882, under each of these sections. e certifies that, in connection with this request, he attention of the jury to his general charge. It does ar, however, that he specified the portion of the at had relation to this particular subject. f the charge referred to by him correctly laid measure of damages in cases of contributory negand was in apparent, if not direct, conflict with the equested and given. The error complained of corrected in this way; the attempt to do so was ilated to mislead and confuse, instead of enlighte jury. The charge should have been refused r, or the objectionable portion should have been and the rule prescribed by the Code for measur. ges in such a case substituted.

taking leave of this case, it may not be amiss to tention of the general assembly to the growing evil railroad tracks and embankments as foot-ways, roke their interposition to prevent, by appropriate n, a practice so fraught with peril, not only to the of the trains and the passengers and freights upon t also as a safeguard and protection to the unwary less, who commit such trespasses and take such and frightful hazards.

The judgment of the court, as now constituted, is prupon the last ground only. It is proper to state, in the connection, that this opinion was prepared and written is accordance with what were understood to be the view as expressed in several consultations with me, of our esteemed and lamented colleague, the late Justice Crawford.

After it was prepared, his extreme sickness forbade it being presented, and he had no opportunity of finall revising and of approving or disapproving, or modify ing it.

Judgment reversed.

JACKSON, Chief Justice, concurring.

1. I concur in the judgment of this court granting a netrial in this case, on the ground that the court erred is charging the jury, as requested by the plaintiff below, to the effect that, though that plaintiff was himself negliger the railroad company must make good the damage.

The words "must make good the damage," withou qualification, would convey the idea that the compar must, in such a case, pay full damage, and thus withdre from the jury the consideration of the doctrine of contri utory negligence as lessening the damage which the ju should give in such a case. No matter how negligent t company may have been, yet if the plaintiff was also no ligent, full damage ought not to be given, but the dama should be diminished in the proportion which the neg gence of the plaintiff bore to that of the company. declares our Code, and so this court has ruled again a again. The doctrine was applicable to this case, and shou have been considered by the jury and weighed in the scal of the evidence, and decided as their judgment on the facts determined, on a scrutiny of the negligence of bo The effect of the charge as given was to wit draw the contributory negligence of the plaintiff, if the

ound that he did contribute, from the jury, and thus t the defendant.

s true, that in the general charge the court does he jury that doctrine, but this request, coming afterand being given without any qualification at the was given, was well calculated to mislead the jury, ay have done so.

n the more satisfied to concur with my colleague in ant of a new trial in this case, because I believe, ur consultations upon it, that my late much-lamented gue, Judge Crawford, was very decided in the opinat it ought to be granted; and had he lived, he might ly have gone to the full extent of denying any rety, to which Judge Hall has gone in the opinion just red.

o that extent I cannot go. Where a parcel of youths ildren are in the habit of passing to and from school ath within the right of way of a railroad company, ve been for years in that habit within the limits of ge, in the knowledge of the railroad authorities, I thold them to be trespassers to the extent and in ase that the railroad company are only liable for negligence if any of them be killed or injured. ntrary, I hold that the company is bound to use all ry and reasonable care and diligence to avoid injury n, and neglect to use such reasonable and ordinary nd diligence would make the company liable. The respect to passengers, diligence toward them, is rdinary care and diligence. It is that which a comarrier, which the company becomes, must use. Code. 3, 2067, 2083.

rule in the case of persons not passengers is that I have given above, "all ordinary and reasonable and diligence, the presumption in all cases being the company." Code, 3033.

this rule has been applied by this court to a pert at all rightfully on the railroad track, but wrong-

fully there, sixty yards from a crossing, without any consent of the company, express or implied. 37 Ga., 593.

In that case, gross negligence was expressly denied to be that neglect which would make the company liable, but it was held by the unanimous court that the measure of the liability is "all ordinary and reasonable care and diligence, not gross negligence as was insisted by counsel for defendant in error," in that case. But if gross negligence be the rule in the case at bar, it is for the jury to say whether the neglect to ring, to slacken speed, and having the scantling projected out as it was, be not gross negligence.

Such is the law of this state, plainly written and printed in her statute book and ruled and applied by her highest court.

The question of negligence is for the jury. 34 Ga., 330, and following cases passim. The quantum of diligence required of the railroad company by the law being given by the court, it is for the jury to say whether or not facts proved make that quantum, subject of course to a review by the court to see whether the jury had enough testimony in to support the verdict. As the case goes back, I dislike to argue the facts or pass upon them at all. views submitted by my associate make it necessary that I say that, if the railroad train swept through that village without ringing its bell or slacking its speed, with a scantling projecting unusually from its car, beyond the track, though within the right of wav of the company, and thereby a youth was hurt in its rapid transit, the company is liable, unless by the use of ordinary care he could have avoided the consequences to himself of such transit, or the injury was caused by his own negligence alone. If both himself and the agents of the company were to blame, or were at fault, but neither the sole cause of the injury, and if he could not by ordinary care have avoided the consequences to himself, then the damages should be apportioned in proportion to the default of each. Under our law, it is for the jury to pass upon all these questions of diligence and

ligence and ordinary care in avoiding the consequences negligence or want of diligence when the emerchis upon the party complaining. The age of the • tiff, his youth, should be considered on the one hand, Previous warnings, if any were given, on the other, the light of these and all other facts and circumes proved, the jury should make their verdict. Th, I think, is the law of Georgia applicable to the of this record; and I do not propose to examine the England or of other states on the issues made. >f° tatutes of this state and the judgments of this court onstruing them bind me. The main question, I think, is ruled in the case of vs. The Central Railroad Company, 60 Ga., 339. possible distinction between that case and this there the declaration alleged that the plaintiff was the railroad track by its consent, and here no express is proved. But in the Baston case the declaration aver express consent, and inasmuch as all plead-Construed against the pleader, it is clear that the • the court was not upon the character of the conhether express or implied, but upon assent to the being on the road, by agents of the company; for se the omission to aver that the consent was ex-> and to set it out as such, would have been fatal to eclaration, and the demurrer would have been sus-1. Besides, the judgment there is not put on the of the company as essential to the ruling; but in Pi nion it is said in conclusion, not that the right of turned on the consent of the company that he Q be on its road, but the language is: "Especially the is be his right, when he was on the track by the of the defendant," as much as to say, he had a go to the jury on the allegations any way, but the of the defendant rendered the right indubitable. Consent is emphasized, because it put the point and more irresistible; but without it, the declawould have been held good.

Be that as it may, I hold in this case, as I did in that, that the plaintiff, under the facts, is not a mere trespasser, but is entitled to more consideration than a trespasser, that is, to all ordinary and reasonable care and diligence. It will be seen from that case that I wrote that a naked trespasser would be protected from gross negligence. The case cited from the 37th Ga., 593, where the point came squarely up, would seem to put even a naked trespasser upon the higher ground of ordinary diligence, that is to say, the liability which attaches to ordinary neglect. Code, \$2061. Gross neglect is quite a different thing. Code, \$2063. The one is the absence of the care of an inattentive man; the other of a prudent man.

I think that the unanimous decision in the 37th is the law rather than my obiter in the 60th, Code, \$217. See also The Central Railroad vs. Glass, adm'x., 60 Ga., 441, where a recovery was had because the conductor and engineer were not sufficiently diligent in looking out for Glass, who was lying drunk on the road a mile from the place where he was put off. There the court say: "Leaving out of view altogether the conduct of the conductor and brakeman (of the down train) in putting Glass off at the place and time they did so, the law presumes that the up train which did the damage was negligent, and there is, in our judgment, no sufficient proof of diligence on the part of the officers of that train to rebut the presumption." So that Glass, a naked trespasser, recovered on the ground, not of gross negligence, but ordinary negligence.

This case at bar was here before. It is reported in 64 Ga., p. 475. The case was then sent back upon the law substantially as indicated above, and no intimation was made by the court that there could be possibly no recovery. On the contrary, on errors of law it was then remanded; on an error of law I now concur in again remanding it. The line of my brother's argument leads inevitably to the conclusion that, under the facts, there can

recovery. It would have been the duty of this to have so declared then, had it so thought; because uld have been a waste of time and of costs to have before a jury an issue which this court would not it to stand if determined by that jury in a certain Having not so held, in common with my brethren I cannot so hold now; but I concur in the judgment the case be tried again, because I think the court in giving, without qualification, the charge requested, nt to abide the verdict of the jury on the issues of which may be again made before them.

dd that the court below may have charged the rebecause it was the language of this court in some
here; but what this court lays down as law is to be
rued in the light of the facts of each case, and it will
and unsafe for counsel to copy from the reports an
act principle of law, and request it to be charged,
or the court to charge as so requested. Besides, someunguarded expressions of the individual member of
ourt writing the opinion may mislead, because those
essions needed qualification.

om the above it will be seen that the opinion of my er, as a whole, is his own, and not that of the court; ase but two of the court sat in final judgment of the and I cannot assent to many views of the law which is expressed as applicable to and ruling and control-he case at bar. This I say in entire respect for the lang and integrity which distinguish him as a lawyer judge.

### NEFF & Co. vs. Broom.

[This case was brought forward from the last term, under \$4271 (a) of the Code.]

- 1. In an action for damages by an employé against the master, the controlling question being whether there was negligence on the part of the master, if there was evidence from which the jury might have inferred its existence, this court will not reverse the ruling of the presiding judge in refusing a non-suit and submitting the case to the jury.
- 2. A soap manufacturer conducted his business in a room about seventy-two feet in length and twenty-two in width. In the front portion of this room, the ceiling was fourteen feet high, and in that place, benches or tables were located, on which the soap was put into wrappers. The plaintiff was employed to stand or sit at one of these tables, have soap and paper furnished her there, and put wrappers around the former. In the rear portion of the room, the ceiling was only six feet and two inches from the floor, and there were located the fixtures connected with the business, some of which projected through the low ceiling, and also kettles and reservoirs set into the floor. The paper used for wrapping was kept upstairs, and brought down as needed, and put upon the tables when called for. Women never had to go after it, nor had they any business in the rear portion of the room where the fixtures were. On one occasion, the paper had been removed from the tables to the rear of the room, to prevent it being blown about by the wind. The plaintiff returned to her work at a time which was not within the ordinary working hours, and while the other hands were at dinner. She went into the rear portion of the room after paper, and in returning, fell into a reservoir containing lye impregnated with potash, and was injured. It was testified by servants who worked for the same master after the accident, that wrapping paper was kept in different parts of the room, and some of it close to the reservoir:

Held, that under these facts, there could be no recovery, there being no duty resting on the master which he violated.

February 20, 1853.

Non-suit. Negligence. Damages. Master and Servant. Before Judge Hillyer. Fulton Superior Court. April Term, 1882.

Reported in the decision.

MYNATT & Howell, for plaintiff in error.

C. Dorsey; J. R. Gray; VAN Epps, Calhoun & King endant.

ford, Justice.

plaintiffs in error being manufacturers of soap, had, of the rooms of their building, a reservoir contains impregnated with potash. The defendant in error, one of their employés engaged at work in that room, to this reservoir, and alleges that she was painfully d. She brought this suit to recover damages from aintiffs in error for their negligence in keeping the so dark that she was unable to discover the reservoir, a not notifying her of its existence that she might protected herself against injury therefrom.

testimony on the part of the plaintiff shows that she imployed to wrap soap for the defendants; had been it service about a week when she was injured. She aid by the box for her work, and when the accident ed, had gone to work out of work hours, and whilst her hands were at dinner. The soap and paper were at the table where the wrapping was done, but at me, there was none at hand, having been removed to of the co-employes to the back part of the building, went its being blown about by the wind. The plainther table and place of work, went back to get it, she returned, fell into the reservoir, and her injuries ed.

as further testified, in behalf of plaintiff, by two witthat they had worked for the defendants, wrapping
come time after the plaintiff was hurt, one of whom
that the paper was in different parts of the room,
me of it near the reservoir; the other, that paper
rnished most of the time, but sometimes not brought,
they got it themselves. No other testimony was
ted by the plaintiff, except in reference to her inloss of time and the expenses of her illness.

At the conclusion of this evidence, the defendant, by his counsel, moved for a non-suit, which was overruled by the court; and this constitutes the first exception made, by the record.

The main ground upon which counsel relied for the nonsuit was, because the defendants had a right to have the reservoir where it was, and, under the facts of the case, the plaintiff had no right to complain of the omission to enclose it.

That the defendants had the right to locate and leave unenclosed the reservoir and all things else necessary for the manufacture and preparation of their soap for market, is, we think, unquestionable. Moreover, that they had the right to do this, even though they may have been in the same room where the plaintiff was, and where her work required her to be, is likewise unquestionable, because the enclosure thereof was not a duty which they owed to the plaintiff. But this does not exactly meet the complaint which is here made. It is charged that they were negligent, in keeping the reservoir in a part of the room too dark for her to discover it herself, and in failing to notify her of its existence.

Under this complaint and the testimony submitted, must the motion for a non-suit be considered. Taking the case, then, as thus stated, there was no negligence shown upon the part of the defendants, unless her work made it necessary for her to go into that part of the room to enable her to perform her duties. There was no evidence showing that, up to the time at which she was hurt, the paper had ever been kept in that part of the room, or that those engaged in such work had to go there for paper. But it is stated by the two witnesses who worked there afterwards that the paper for wrapping was kept in different parts of the room, and some of it close to the reservoir.

This having been testified to, the jury were at liberty to consider it, and might have inferred therefrom that such was the case whilst the plaintiff worked there, and that

d to pass, or go near, the reservoir in order to do rk, and, therefore, it was negligence in the defendot to notify her that it was there.

lst we are not prepared to say that it would have lear error in the judge to have ordered a non-suit, there was some testimony tending to show negliupon the part of the defendants, and he chose to that question to the jury we do not think that he in so doing.

testimony of the defendants showed that the length room where the plaintiff worked, was seventy-two nd its width twenty-two feet. That part where she e wrapping differed from the part to which she in that the former was light, and fourteen feet from to ceiling, whilst the other was dark, and only six wo inches from floor to ceiling, and had in it the es necessary to the carrying on of their business. s kettles, ten feet in diameter, coming down through w ceiling from above stairs; a wooden frame-work floor supporting the "crutcher"; another kettle set floor near the reservoir, and from which the spent as drawn into the reservoir, making, indeed, a wholly ent apartment. It was also shown that the paper used apping was kept up stairs, and only brought down ded; that to have put it in the neighborhood of the oir would have been to render it wholly unfit for hat it was always brought when called for, and put on the table, the women never having to go after it; that nad no business back in the rear of their work, under ow ceiling where the fixtures were. r testified by one of the defendants, and not denied e plaintiff, that the contract was that she was to sit nd at the table and wrap soap; that both wrappers pap were to be furnished her there, and that it was s done.

jury returned a verdict for the plaintiff, and the lants moved for a new trial, upon the several grounds

set out in their motion, which was refused, and they excepted.

The first ground of the motion for a new trial, was the refusal to non-suit the plaintiff, which we have considered. The only other ground which becomes material to pass upon, is, whether the verdict is contrary to law and contrary to evidence.

We think that it is well settled, both upon principle and authority, that wherever the facts raise a duty or an obligation on one to do a particular thing, and the failure to discharge such duty or obligation causes damage to another, the party upon whom the duty falls, or obligation rests, is liable to respond for the injuries thereby sustained. It follows, of course, that where no duty exists or obligation rests, though injuries may be sustained, yet no liability accrues. 1 H. & N. Ex. R., 247; 7 H. & N. Ex. R., 736; 1 H. & Colt. Ex. R., 631-4; E. C. L., 71, 326; B. 96, 168; 48 Vert. R., 127-131; 1 Thomp. Neg., notes, pp. 303-4; also, pp. 309-10; 44 Ga., 251.

There being no negligence in the defendants not fencing off their fixtures from the portion of the room occupied by the plaintiff, was there any in the failure to give her notice of the danger to her from the reservoir? We recognize their obligation to provide her with a perfectly safe place for the performance of the duties in which she was engaged and if, for any proper purpose she was expected or re quired to expose herself to the danger of falling into their reservoir, it was their duty to have notified her of its existence that she might have guarded against it. It is shown by the proof, beyond question, as it looks to us, that there was neither necessity for, nor expectation of her going near the danger; that the accident occurred out of the ac customed hours for work; that those whose duty it was to furnish her with the paper, of which she was in search were away, and their absence known to her; that she chose to wait upon herself rather than be delayed; that she voluntarily went into this unlighted part of the room Western and Atlantic Railroad vs. King

y her own negligence, occasioned her injuries; that is paid by the quantity of work she did, and being ung to await the return of her co-employés, sought to m not only her own, but their duties. If, however, be any doubt as to all this, the clear, distinct and we statement of the contract between herself and the lants, that she was to stand or sit at her table and her soap and paper furnished her there, puts at rest jubt as to the place of her work and her duty in connintherewith. Though she was present at the trial, as a witness, and, doubtless, present whilst the dent was delivering his testimony, yet she never denied attement, or sought to impeach him.

ing the law, then, as we have laid it down, and the is proved at the trial, the verdict should have been ide and a new trial granted.

gment reversed.

# WESTERN AND ATLANTIC RAILROAD vs. KING.

ilroad company is liable for any damage done to persons, stock ther property by the running of its trains, unless the comy shall make it appear that their agents exercised all ordinary reasonable care and diligence to prevent such damage; but re, in an action for killing a horse, the court, after charging principle, added, "that is, might say, a full measure of care diligence—all that could be expected," such charge was error; effect of it being to require extraordinary diligence of the pany.

igence is a question for the jury alone; and for the judge to uct them that if the law provides that the trains shall run a in speed, and they were running above that speed, it was neg-

ce, was error.

10, 1883.

roads. Damages. Negligence. Diligence. Before FAIN. Gordon Superior Court. August Term,

### Western and Atlantic Railroad vs. King.

Mrs. King brought suit for damages against the Western and Atlantic Railroad for killing a horse and destroying a buggy. The case originated in a justice's court, but was carried to the superior court by appeal. On the trial, the plaintiff contended that the train of the defendant had run against the horse and buggy at a road crossing, killing the horse and demolishing the buggy. The defendan contended that the horse had become frightened and ran away, and that the train happening to be passing the road crossing at the time, the horse ran into it without fault or the part of the defendant. There was conflicting evidence as to speed of the train, etc., not necessary to set out in detail. The jury found for the plaintiff. Defendant move for a new trial on various grounds, the only material one being set out in the decision. The court overruled th motion, and defendant excepted.

A. N. STARR; R. J. McCamy, for plaintiff in error.

W. R. RANKIN; E. J. KIKER, for defendant.

CRAWFORD, Justice.

The refusal of the court below to grant a new trial, upon the grounds set out in the motion therefor, brings the cas to this court.

1. The first ground of the motion is, that the judge erre in charging the jury as follows: "If you find from the testimony, that the cars or machinery of the companicaused this injury, the burden is then changed, and it is upon the company to show that their agents of employés in charge of the train, exercised all reasonable and ordinary care and diligence, that is, might say, a full measure of care and diligence, all that would be expected."

By §3033 of the Code, it is declared that a railroad company shall be liable for any damage done to persons, stock or other property by the running of their trains, unless

Western and Atlantic Railroad vs. King.

apany shall make it appear, that their agents have ed all ordinary and reasonable care and diligence ent such damage. Section 2061 defines ordinary see to be that care which every prudent man takes wn property; and §2062 that extraordinary diligithat extreme care and caution which very prudent thoughtful men use in securing and preserving wn property.

ing at the charge of the court in the light of the ry duty put upon the company, it will be seen that ge required more of it than the law imposes. Had ructions ceased on that point after telling the jury e company was bound to exercise all reasonable linary care and diligence, they would have been in armony with the statute. But when he added, by explanation, "that is, might say, a full measure of ad diligence, all that could be expected," he undly erred. A full measure of care and diligence, could be expected, could, in no reasonable view, be be less than extraordinary diligence; and this is tan is required by law.

ne next ground of the motion which we notice is iudge charged the jury, "If, also, the law provides ey shall run at a certain speed, and they were runpove that speed, it would be negligence." This as repeatedly ruled that negligence was a question r the jury, and that for a judge to instruct them what was not negligence, was error. The legal principle hich this rule rests is so clearly stated by Harris, J., use of Wright vs. The Georgia Railroad and Banknpany, 34 Ga., 337, that we reproduce it here; he The jury alone have the right of the determinathis question. It is a complex and difficult matter, o decide, as many considerations enter into it, and ny fact, of itself, is sufficient to establish it clearly. ad been a fact proved, that the axle was too short, yond that was necessary the testimony of some

expert or persons familiar with the running of cars, to show that that was the cause of the accident; certainly the judge has no right to determine what constitutes neg ligence."

As there has been no departure from, or modification of this rule, we hold that the charge complained of wa error, and that the new trial should have been granted in this case.

Judgment reversed.

## DURHAM vs. THE STATE OF GEORGIA.

 2, 3. The verdict in this case was not contrary to law, evidence of the weight of the evidence.

4. Where during the trial of a criminal case, by the consent an under the express wish of counsel for defendant, the jurors wer allowed to use the court room at night for their comfort, and after the presiding judge had called the attention of counsel to the fact that the jurors might have access to the Code and other law book in the court room and expressed doubts as to the propriety of allowing them to remain there, counsel for defendant replied that he did not care if they did have access to the books, and insisted of their being allowed to remain,—it furnished no ground for a new trial, that one of the jurors in fact read to his fellow jurors from the Code the definitions of murder, express and implied malic and manslaughter, and commented on the same from the judge's seat in the court room. The direct waiver of defendant's counse was binding on him.

5, 6. The fifth and sixth grounds of the motion for a new trial, no being certified, cannot be considered.

7. Where the judge gave in charge the substance of certain written requests, and after having completed the general charge, inquire of counsel if there was anything else they would have him charge to which one of counsel for defendant replied "no," that defend ant was entirely satisfied with the charge, it furnished no ground for new trial that the language of the requests was not given in charge.

8, 9. These grounds were not certified.

 Under the evidence, the law of involuntary manslaughter has nothing to do with this case.

(a.) If one who was engaged in a personal difficulty with another fired upon him with a pistol, and, as the latter ran away, again

at him, but missing him killed a third person who was near ach killing would be murder, and not involuntary manslaugh-

ere a witness introduced by the state showed that he was an lling witness, and seemed to be contumacious and equivocal, was no error in allowing the solicitor general to lead him. ere one ground of a motion for new trial was the disqualification and the previous declarations ed to have been made by him adversely to the defendant, and flidavit of the juror in explanation and denial of the alleged rations completely destroyed the objection to him, especially nnection with affidavits of others as to his good character, was no error in refusing a new trial on that ground.

ere was no affidavit of the defendant's counsel showing that were ignorant of this disqualification of the juror. Such affis are necessary.

fact that a young lady, who was a witness for the defendant criminal case, was greatly affected by the circumstances of her tion, was, of itself alone, no legal reason why the defendant's sel should have been permitted to lead her in her testimony; is any sufficient reason shown why it was error to refuse to a this to be done.

court refused to allow defendant's counsel to illustrate with tol how the shooting was done and how the defendant held the I at the time, the judge stating that he did not want a pistol lled loosely about the court-house, and the illustration was made with a pencil. Subsequently the illustration was made nother witness with a pistol:

hat this refusal of the court furnished no ground for new trial. These grounds are not certified, and must be disregarded.

h 27, 1883,

ninal Law. Practice in Superior Court. Charge of Evidence. Jurors. Witness. Before Judge Terrell Superior Court. May Term, 1882.

tham was indicted for murder, and on the trial was sted, with a recommendation to mercy. He moved new trial, which was refused, and he excepted. The intial facts disclosed by the testimony are set out in inth division of the decision. For the other facts see secision.

KETT & PARKS; FORT & SIMMONS; KENNON & HOOD, aintiff in error.

CLIFFORD ANDERSON, attorney general, by Jackson & King; J. H. Guerry, solicitor general; L. C. Hoyl; R. F. Simmons, for the state.

## CRAWFORD, Justice.

The assignment of error in this case is the refusal of the judge to grant a new trial, upon the various grounds set out in the motion therefor.

- 1, 2, 3. The first three are that the verdict is contrary to law, contrary to evidence, the weight of evidence, and contrary to law and evidence. A close examination of the entire record satisfies us that these grounds are not well taken.
- 4. The fourth is that one of the jurors, H. G. Lamar, during their deliberations over the verdict, read to his fellow jurors from the Code of 1873, the definition of murder, express and implied malice, and manslaughter; and commented on the same from the judge's seat in the court room.

Touching this ground, the judge says that, for the comfort of the jurors at night, they had been allowed the use of this room during the trial, not only by the consent of the counsel for the defendant, but by his express wish that they should be allowed to do so. The judge says that he suggested that they might get the books in the court room, when Mr. Simmons, defendant's counsel, said in reply that "he did not care; the more they read, the less they'd know." After they had been charged by the judge, and the case submitted, and before the adjournment for the night, the counsel for the state and the defendant were called to the bench privately, and told by the judge that he had doubts on his mind whether they should be allowed, after entering upon the consideration of their verdict, to still occupy the court room, as they would have access to the Code and other law books: whereupon Mr. Simmons, defendant's counsel, immediately replied, that

d not care if they did, and insisted on their being ed to remain. With this unqualified consent, given the statement to counsel about the books, the jury allowed to occupy the room as before.

e refusal of the judge to grant a new trial on this d was proper and legal. And we do not see exactly what reason counsel can justify such an attempt to advantage of an agreement so deliberately entered privately with the judge, and publicly in open court, y be that the importunity of a condemned client ame that just sense of propriety which otherwise we counsel must have recognized.

oking, then, to the question of law taken in this ground y that the waiver by the prisoner's counsel was bindpon him, and upon the following authority:

the case of Sarah, a slave, vs. The State, 28 Ga., this court say: " And we lay down the broad propothat, as a prisoner may waive even a trial itself. be capitally punished upon his own confession of he may waive any minor right or privilege." Again case of Hoye vs. The State, 39 Ga., 719, it was held a defendant who is charged with a crime involving e or liberty, is not held to have waived anything, s by express agreement for the purposes of the trial." urther, the judge delivering the opinion for the court "He waives nothing by implication or intendment. unless he expressly waives an objection to the adment, with a view to a trial which is to bind him, he take advantage of it even after verdict." It will also en in the case of Martin vs. The State, 51 Ga., 567, defendant may lose a privilege or a right by a clear istinct waiver thereof.

at which was done in the case at bar, leaves no room ubt but that this ground, under the authorities cited, properly overruled.

6. The fifth and sixth grounds, not being certified to, of be considered.

 The seventh ground is based upon the refusal of the judge to give certain written charges requested by de fendant's counsel.

The judge states that he gave the substance of the requests in his general charge, and after he had completed it, out of abundant caution, he inquired of counsel if there were anything else they would have him charge, when Mr. Simmons of counsel for defendant arose in his place and in the presence of the jury said "No," that "defendant was entirely satisfied with the charge," which he under stood to be a withdrawal of the charges requested.

- 8, 9. These two grounds the judge also refused to certify.
- 10. Because the judge said to the jury, "Under my view of this case, involuntary manslaughter has nothing to do with it."

The correctness of this statement of the judge depends upon the facts shown by the proofs. If in any possible view of the case a verdict for involuntary manslaughter might have been found by the jury, then the judge erred otherwise he did not.

The record shows that the cause of the quarrel which resulted in the death of the deceased, originated between the defendant and one J. B. Hays, in which it is shown by the state that a dispute arose between them about the weight of some meat, which the defendant was purchasing from Hays, when the defendant gave Hays the d—d lie, drew his pistol and presented at him, upon seeing which Hays gathered a weight, knocked up the pistol with his other hand, but not in time to protect himself entirely from the shot which struck him, and after the fire dropped the weight, turned away and started out of the house. The firing of the pistol attracted the attention of White, the deceased, who was outside, but came in quickly, and going up to the defendant endeavored to take hold of him, when according to the best recollection of the witness as to what

d, the defendant asked White if he had taken it up, hrew up his pistol hand, fired and White was killed the theory of the defendant was that Hays took the at first, caught the defendant by the shoulder and, an oath, threatened to fix him, when the defendant upon him, and as quickly as he could cock his pistol it at him again, when the shot took effect upon White. It this proof, taking either theory of it, the killing of would not have been justifiable, but would have an unlawful act which in its consequences tended to by the life of a human being, and would have been hable by death or confinement in the penitentiary. It is a crime, says the Code, §4327, can never be held to voluntary manslaughter, but shall be deemed and ged to be murder. 58 Ga., 212-215.

t taking the facts as they undoubtedly were, from the nony of all the witnesses under their direct and cross ination, and the truth is, that after Hays was shot, ropped the weight and endeavored to escape the d fire by trying to get out at the front door of the And that White was endeavoring to prevent the dant from firing again when he approached him; but dant, supposing that he intended to befriend Hays, at and killed him. Even if he had been firing at who was really fleeing from him, and had gotten een or twenty feet away, and killed White, it was er, and the judge was right in saying to the jury that untary manslaughter had nothing to do with the case. 2., 611; 55 Ib., 697.

Because the court permitted the solicitor general to Sims, a witness for the state. As to this ground, the states that this witness was an unwilling witness, ed to be contumacious and equivocal; he therefore the state's counsel that he might lead him if he de-

There was no error in so ruling.

The twelfth ground relates to the disqualification of of the jurors, arising out of some previous alleged

declarations which were adverse to the defendant. The affidavit of the juror himself in explanation and denial of the declarations alleged to have been made by him, completely destroys the objection to him, and especially when considered in connection with affidavits of other parties as to his good character. 58 Ga., 296, 299.

Besides, there was no affidavit from any of the defendant's counsel showing that they were ignorant of this disqualification of the juror. Such affidavits are necessary. 59 Ga., 474; 56 Ib., 401; 20 Ib., 660.

- 13. Because the court erred in not allowing defendant's counsel to lead Miss Sallie Durham, one of defendant's witnesses. There is no sufficient reason shown, why the rule should have been changed as to this witness; nor that the judge exercised his judicial right improperly. The fact that the young lady was greatly affected by the circumstances of her situation, was, of itself alone, no legal reason why the defendant's counsel should have been permitted to lead her in her testimony.
- 14. This ground is approved with such qualifications as to render it exceedingly uncertain as to what did actually transpire. The complaint, however, seems to be that the judge refused to allow defendant's counsel to illustrate with a pistol, by A. J. Hays, how the shooting was done, and how the defendant held the pistol at the time. This the court says that he directed stopped, as he did not want a pistol handled loosely about the court house, and that the illustration was then made with a pencil. It further appears, however, from the evidence in the record, that subsequently Wm. Bozeman, a witness for the state, did illustrate with a pistol what was wanted.
- 15, 16. These two grounds are not certified to and must be disregarded.

We have thoroughly examined this entire record, and are forced to the conclusion reached by the jury, that the plaintiff in error is guilty of murder, and must abide the result of his unfortunate act.

Judgment affirmed.

Woodruff & Company vs. Saul.

### WOODRUFF & COMPANY vs. SAUL.

here a debtor agrees with his creditors that he will pay them a rtain per cent. of his liabilities, in consideration that they are to scharge him from his debts, if he privately agrees to give one a tter or further security or to pay one more than the others, the ntract with the other creditors is void.

a debtor misrepresents or suppresses any material fact in the atement of his affairs, either as to the amount of his property or a amount of his indebtedness, the composition agreement is id.

common law, the misrepresentation of a material fact made by e of the parties to a contract, though made by mistake and incently, if acted on by the opposite party, constitutes legal fraud. Where a contract of composition was made in Tennessee, if nothg appears to the contrary, the presumption is that the rules of e common law prevail there, and they should be given in charge. was, therefore, error in this case to charge that the debtor must low his representations to be false, in order to avoid the settleent made.

ay 1, 1888.

ebtor and Creditor. Fraud. Contracts. Presump-Laws. Before Judge CLARK. City Court of Ata. June Term, 1882.

eported in the decision.

BUBEN ARNOLD; SAMUEL BARNETT, Jr., for plaintiffs in r.

W. SMITH; MYNATT & Howell, for defendant.

wrord, Justice.

W. Woodruff & Company sued W. S. Saul on an unt for the sum of \$116.05; the defendant filed no, but answered at the first term, and relied upon that he filing of the general issue. Under amendments e to the plaintiffs' declaration, and the testimony subed, the case finally turned upon the liability of the ndant to pay the account, notwithstanding the fact

Woodruff & Company vs. Saul.

that the plaintiffs, under a deed of assignment, had agreed to accept fifty cents in the dollar in full payment of the said debt. This liability was claimed upon the ground that this acceptance and agreement was procured by the false and fraudulent representations of the defendant, and therefore void. Under the evidence and charge of the court, the jury found for the defendant.

The plaintiffs moved for a new trial, upon the several grounds contained in their motion, which was refused, and The grounds of the motion which control they excepted. the case arise upon the law as charged, and the refusals to charge certain legal principles, requested in writing by the plaintiffs in error. Many requests to charge were asked, but they involved in substance only two legal prin-These were, first, that if the defendant debtor made any secret arrangements with a portion of his creditors, by which he was to give them anything outside of the settlement, and more than was to be paid to the other creditors, then the composition agreement was void, because a fraud on them; and second, that if there were any misrepresentations or concealments by the debtor as to his assets or liabilities, this was a fraud upon the creditors, and made the contract of settlement and acceptance void.

- 1. That these are correct legal principles there can be no question. Where a debtor agrees with his creditors that he will pay them a certain per cent. of his liabilities, in consideration that they are to discharge him from his debts, if he privately agree to give a better or further security, or to pay to one more than the others, the contract with the other creditors is void. Story's Eq. Jur., §§378, 379, and notes; Kerr on Frauds, 214 and cases cited; 4 East, 380; 11 *Ib.*, 393; 6 Ves., 300; 15 *Ib.*, 55; 4 Barn. & C., 511.
- 2. If a debtor misrepresents or suppresses any material fact in the statement of his affairs, either as to the amount of his property, or the amount of his indebtedness, the com-

Hughes et al. vs. Berrien, administrator, et al.

on agreement is void. Bump on Composition at non Law, p. 20, 21, 22, and authorities cited; 6 Term 263; 43 Conn., 160; 83 Ill., 25; 23 N. H., 519.

The error complained of in the charge given, is that ebtor must know his representations to be false, to the settlement void. It is thoroughly well settled a common law that the misrepresentation of a materict, made by one of the parties to a contract, though by mistake and innocently, if acted on by the opparty, constitutes legal fraud. Story's Eq., 191 et Kerr on Fraud and Mistake, 53 et seq.; 6 Ga., 458. Is contract of composition having been made in Tence, the presumption is, if nothing else appear, that the of the common law prevail there, and that the above principle should have been given in charge to the instead of that which was given.

are not unmindful that the counsel for the defenderror relied upon the fact that the testimony subd on the trial was not such as to warrant the charges, and therefore, there was no error in their refusal. hink, however, that the proof was such as to authore judge to have charged these principles, so that if ry should have believed the facts to have been as ed by the plaintiffs, then they might have found for

lgment reversed.

Hughes et al. vs. Berrien, administrator, et al.

sift of land by a father to his son was completed, a judgment net the donor would bind the land and prevent the subsequent pletion of the gift. This case is governed by that in 59 Ga., where it was held that the lien of this judgment attached to land prior to the consummation of the title.

ne son was not a bona fide purchaser for value, and besides, he ned to have been in possession when the judgment was obed. The rule as to four years' possession by a bona fide pur-

er did not, therefore, apply.

1 17, 1883.

Hughes et al. vs. Berrien, administrator, et al.

Judgments. Liens. Title. Volunteers. Before Judge SNEAD. Richmond Superior Court. October Term, 1882.

Reported in the decision.

H. D. D. Twiegs, for plaintiffs in error.

F. H. MILLER; THOS. M. BERRIEN, for defendants.

CRAWFORD, Justice.

This bill was filed to compel the specific performance of a parol contract for land, alleged to have been made between William W. Hughes and his son, George W. Hughes.

The controlling question in the case is as to the effect which the lien of a judgment against the father would have upon such a title, before the same had ripened in the son under §2664 of the Code.

The contract is alleged to have been made in May, 1865 and the judgment obtained in February, 1867; so that less than two years had elapsed from the date of the contract to the rendition of the judgment. The legal question in volved in this bill was ruled by this court, in the case of Hughes vs. Clark, administrator, 59 Ga., 136, which is really the same case, with only a change of forum and the addition of parties, thought to be necessary before an adjudication could be had. It was there held that the lies of the judgment attached to the land prior to the consummation of title in George W. Hughes, the intestate of Clark, the administrator, and the husband and father of the complainants in this bill.

This lien having fastened itself on the land whilst the title was in William W. Hughes, it became an incumbrance thereon, and before the said George W. Hughes could perfect his own title therein, he must remove it. And if then it shall be made to appear that under the

Blain et al. vs. Hitch.

id section of the Code he had acquired title, the rould be sustained by the law.

as strongly urged on the argument, that the failure on the land in controversy for more than four years ne judgment was obtained, discharged it from the said judgment. We do not see the force or the ation of this legal rule to this case. George W. s was not a bona fide purchaser for a valuable contion, and besides, he claims to have been in possesthen the judgment was obtained.

think, therefore, that the real question which setis case is res adjudicata and the chancellor below tted no error in dismissing the bill.

zment affirmed.

## BLAIN et al. vs. HITCH.

This case was argued at the last term, and the decision reserved.]

re a defendant in a criminal case, who had been convicted of sdemeanor and sentenced to pay a specified fine or serve by days in the chain gang, procured two other parties to give promissory note in satisfaction thereof, and such note was sted by the solicitor general as the equivalent of cash, the contation was not illegal, and in a suit thereon a plea to that it was properly stricken.

als from a justice court to the superior court should be tried jury, and a judgment by the court would have been illegal,

the case not been submitted to the judge by consent.

amount for which judgment should have been rendered is a le matter of calculation. If it should appear from the pleadand proof to have been rendered for too much, the judge is orized to require the excess to be written off therefrom.

h 13. 1883.

tracts. Officers. Practice in Superior Court. Beudge Mershon. Glynn Superior Court. December 1881.

orted in the decision.

Blain et al. vs. Hitch.

SYMMES & ATKINSON, by J. H. LUMPKIN, for plaintiffs error.

S. W. HITCH; IRA E. SMITH, for defendant.

CRAWFORD, Justice.

For a misdemeanor James Smith was sentenced in the superior court of Glynn county, to pay a fine of \$50.0 and costs; or upon failure to pay, to serve ninety days the chain gang. He paid the fine and costs with a promisory note made by the plaintiffs in error in this case. When they were sued upon the note, they set up, by we of defence against its payment, that it was given in satisfaction of the fine and costs against Smith, and, therefor based upon an illegal consideration; that it was contrated to the policy of the law, and should not be enforced. The plea was demurred to, the demurrer sustained, and judgment rendered for the plaintiff for the debt and costs.

1. Error is assigned upon the striking the plea and the judgment rendered by the court. To show that the judg below erred in his ruling, and in the final judgment, w are cited to §\$2749, 2750 of the Code. By the first these sections it is declared that a contract to do an in moral or illegal thing is void and by the second that contract which is against the policy of the law cannot be enforced. We are also referred to other sections of the Code, providing that any attempt to satisfy a public offence suppress a prosecution, or compound a felony is illega and vitiates an agreement made for that purpose. I looking at these citations, as well as the other authorities referred to, we are unable to see their applicability to th A fine was imposed upon a violator of th law, which he was compelled to pay, or serve ninety day upon the chain gang. Not having the money, he paid with the promissory note of the plaintiffs in error, which he procured to be given in satisfaction thereof, and which Blain et al. w. Hitch.

ccepted by the officer of the law authorized to receive so much money.

w it could be construed into a contract to do an iml or illegal thing, does not occur to us. It was not a act to satisfy, but to answer for a public offence; it not a contract to suppress, but to suffer the penalty wing a prosecution; it was not a contract for comding a felony or a misdemeanor, but meeting the sentot the law for the commission of an offence.

nether the party fined had this note of the plainnerror already in hand, and paid his fine with it, or nem to give it for that purpose, does not change their ity. The consideration for the note, if it be as claimed, valid, given in the advancement of public justice, and sense contravened the policy of the law. There was ror in striking the plea.

It was urged on the argument that the judgment st the defendants was illegal, because it was in the for court on appeal from a justice's court, and should been tried by a jury. This objection would be fatal and not been submitted by consent to the judge to fed without the intervention of a jury, but this having done the judgment is valid.

It is further claimed, that there is error in the judg, because it was rendered for a larger sum than was
on the debt. Whether this be so or not, may be easily
tained upon an accurate calculation, but there is no
ment of error in the bill of exceptions on this ground,
here was no such question raised in the court below,
e, we do not rule upon it. If, however, there be such
able error appearing on the face of the pleadings and
is as is insisted upon here, the judge below is hereby
brized and empowered to require that the same be
en off from the amount of the judgment before the
shall issue.

dgment affirmed.

## Blanchard & Burrus et al. vs. Vansyckle & Con PANY et al.

- The act of 1881 gave a new remedy against insolvent traders; be
  if a firm had sold out their entire interest in their business, an
  had ceased to do business, the right to proceed against the
  under the act of 1881 did not exist, and t would be error to grad
  an injunction and appoint a receiver under a bill filed for th
  purpose.
- 2. Whilst it is true that, under the act of 1881, pre-existing liens a not to be interfered with, and parties with such liens are not to hindered and delayed in the exercise of their usual common la remedies, yet if they voluntarily come in and ask to be made paties defendant to a bill filed under that act, and submit their liet to that investigation which a court of equity may exercise ov them, and they are assailed for invalidity or cast under such suspicion as to induce the chancellor to put the property they are seeing to sell, in the hands of a receiver, they must abide by hinderent.
- (a.) The chancellor having held the original defendants to be st traders when the bill was filed, all prior alienations and liens me be attacked as incidental to the power to collect and marshal that assets.

March 27, 1888.

Debtor and Creditor. Insolvency. Equity. Injuntion and Receiver. Liens. Before Judge WILLIS.

Reported in the decision.

GOETCHIUS & CHAPPELL; THORNTON & HARGETT, for plaintiffs in error.

LITTLE & WILLIS; JAMES M. MOBLEY; CAMERON & WATTON, for defendants.

CRAWFORD, Justice.

On the 28th day of November, 1882, the defendants of error filed their bill, under the act of September 28th, 188 against J. H. Cowsart & Company, alleging that the were traders engaged in business, indebted to complainant



solvent. Wherefore they prayed the appointment ceiver to take charge of the assets of the said firm, a injunction restraining them from disposing of their of goods, or collecting any of the notes, accounts, or in action due to the said firm, or any member f, until the further order of the court.

bill was sanctioned by the chancellor, a restraining granted, and defendants required to show cause on a day of December next thereafter, why an injunctional not be granted and a receiver appointed as I for by the bill. The hearing of the application fterwards continued to the 25th day of January fol-

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this day, Cowsart & Company showed for cause the prayer of the bill, that on the 23d day of Nor, five days before the filing of complainants' bill, ad bona fide and for a valuable consideration sold all stock of merchandise, store-fixtures, notes and act, on books or otherwise, to H. C. Kimbrough, and om that time ceased to be traders or to do business.

chard & Burrus, I. Joseph, president of the Pioneer erative Company, and Wm. L. Tillman, on the day of aring for injunction and receiver, appeared before ancellor and by petition set forth that they were editors, having mortgage fi. fas. against Cowsart & ny upon all their stock of merchandise, notes, etc.; eir said mortgage was executed by the said Cowsart pany, on the 10th day of November preceding the of complainants' bill; that they had foreclosed the and had the stock of goods levied upon by the sheriff county on the 20th day of January instant, the t of which several mortgage ft. fas. was about twelve ed dollars; and that the stock of merchandise, towith the amount due upon the books, etc., would ual so much as that sum, and perhaps not the half Wherefore, the premises considered, they prayed

to be made parties defendant to said bill, that their pet tion be taken as their answer thereto, and that the char cellor would refuse the complainants' application for the granting of an injunction and the appointment of a receiver, so as to prejudice their rights as lien creditors upon the disposition of the aforesaid stock of merchandise. The chancellor, upon this petition, made the petitioners particular defendant to the bill, and proceeded to the hearing upon the complainants' application for injunction and receive

The complainants supported their bill by proof of their claims, the failure of the defendants, and that M. I Kimbrough, one of the firm of Cowsart & Company, ha said, on a day after the alleged sale of all the assets to E. Kimbrough, that he had been trying all that day t collect money due the firm, and that he promised the part to whom he was speaking that, if he would let him alon in business, he would do all he could to collect what wa due on them.

The defendants, Cowsart & Company, in support of thei answer, filed their joint affidavit of the truth of the fact therein set up, and that they had executed the mortgage to their co-defendants on the 10th day of November, preceding the sale, to H. C. Kimbrough on the 23d of the same month and eighteen days before the filing of complainants' bill Affidavits of other parties to the sale to H. C. Kimbrough were offered, as well as to the fact that they had ceased to do business.

The defendants, Blanchard & Burrus, I. Joseph, president, etc., and W. L. Tillman, submitted their joint mort gage, with affidavits for foreclosure; their separate fs. fast dated January 19, 1883; the levies entered thereon January 20, 1883; also affidavits showing that the value of the stock of goods on hand about the 27th day of December 1882, was only from one thousand to twelve hundred dollars.

Upon the pleadings and proofs, after argument had, the chancellor granted the injunction, and appointed a receive

Instructions to take charge of all the assets of Cowthe Company, sell the goods after advertisement, colthe notes and accounts, and hold the proceeds until arther order of the court. To this ruling Blanchard errus, I. Joseph, president, etc., and W. L. Tillman ted.

has been set forth in this opinion, the bill of comants was filed under the act of 1881, with the view complishing that which was done by the chancellor. plaintiffs in error insist that under law, and the evibefore him, his judgment was erroneous, and we are to review and reverse that judgment.

The questions made by the bill were, whether the dants in the bill were traders engaged in business? they indebted to the complainants, and were they ent? It was alone upon the first of these two questhat any dispute arose. It was insisted that they old out their entire interest in their business, on the lay of November, 1882, to H. C. Kimbrough, and that day had ceased to do business. If this be true. the right to proceed against them under the act aforeid not exist, and the chancellor erred in granting the r of the complainants. It was, however, a question t to be determined by him, and unless he was withfficient evidence to authorize his conclusion, his judgmust be affirmed. The law clothes him with power r and determine the proofs submitted; and we can ook into such proofs to see that he has not abused ower thus conferred upon him. In doing this, we nat he had the sworn bill of the complainants; the vits of parties, showing that the goods had remained at change of location, and were known and recogas the stock of goods of H. Cowsart & Company: he sale alleged to have been made, had been only ays before the filing of the bill; that after this sale. the partners said that he was then trying to collect oney due the firm, and if let alone in business, he

would do all that he could to collect what was due and pay up; that the money due the firm upon the books and otherwise, if the conveyance to H. C. Kimbrough was bone fide, belonged to him, and neither member of the firm was authorized to collect and pay up any other indebtedness. This statement was not denied. It is true that there was testimony adverse to this, but the chancellor saw fit to decide with the complainants; and, according to the uniform ruling of this court on this question, we will not revers him on a matter of fact, where there was no abuse of the discretion exercised.

2. But it is said that he erred in granting the injunction and appointing a receiver, because he thereby interfere with the pre-existing liens of the mortgage creditors, an this is expressly forbidden by the act under which the bi was brought. In reply to this, it is insisted that there are matters of fact appearing upon the face of the papers then selves, and from all the circumstances of the case, t authorize the chancellor to place the assets of this firm i the hands of the receiver, until the rights of the partic may be inquired into and determined. The mortgage wa a joint mortgage, purporting to have been made to secur Blanchard & Burrus \$1000 in notes; I. Joseph, presiden etc., \$950, on notes and accounts; and Wm. L. Tilims \$1500, on divers notes and accounts,—amounting in the aggregate to the sum of \$3450. It was urged that th mortgage did not specify the debts which it was made secure, and that the unsecured creditors were entitled know exactly what debts had priority over their claim and an opportunity to contest their validity in law; an especially so when the mortgage itself was so vague an uncertain as to the amounts, dates and character of the This they claimed was the more important, the amounts for which they were foreclosed reached on the sum of about \$1300, and the stock of goods was suff cient to cover that amount, whilst the mortgagees had als a transfer of the books and accounts, but which it was sai

being collected by one of the members of the firm, and ore inconsistent with the idea of their having really with the title as claimed. In addition to this, it ged that, even if the mortgages were valid, the goods ufficient, or nearly so, to satisfy them, and the only rom which the complainants, who were unsecured ors, could hope to realize anything, was from the and they could be made available to them only the a receiver.

to be borne in mind that the chancellor obtained ction in this case against the original defendants the grounds named in the act of 1881, under his view facts presented to him at the hearing of the applifor the granting of an injunction and the appoint of a receiver. The plaintiffs in error, being mortgage ors, came voluntarily in, and asked to be made parefendant to that bill, and set up their mortgage against the prayer of the complainants, who, upon rounds above stated, attacked their liens; and the ellor, under the facts before him, both as to the original these defendants, held that the ends of justice be more certainly reached by holding up the assets there might be an investigation of all the facts of the

ilst it is true that, under the act of 1881, pre-existing are not to be interfered with, nor are parties with liens to be hindered and delayed in the exercise of usual common law remedies, yet if they voluntarily in, and ask to be made parties defendant to a bill under that act, and submit their liens to that investive which a court of equity may exercise over them, hey are assailed for invalidity, or cast under such sion as to induce the chancellor to put the property are seeking to sell in the hands of a receiver, they abide his judgment. But still, if the liens are valid, must be preserved, and it will be the duty of the ellor, under the law, to see that this is done.

The chancellor having held the original defendants to be still traders when the bill was filed, all prior alienations and liens may be attached as incidental to the power to collect and marshal the assets. See Comer & Company vs. Coates & Company, 69 Ga., 491.

Whether this court would have held under the facts made to appear to the chancellor below, that an injunction should have been granted and a receiver appointed, is not the question before us, we are only to decide whether he committed an error of law, or abused that discretion with which he is empowered to pass on the facts as they were submitted.

It not having been shown to us that he did either, his judgment must be affirmed.

Judgment affirmed.

## HUFF vs. MARKHAM.

## [This case was argued at the last term, and the decision reserved.]

1. The hearing of an application for injunction was continued from the thirteenth until the nineteenth of January, an order being passed at the time of the continuance "that if either party desires to present additional affidavits, they be shown to the adverse party at least two days before the hearing." Affidavits were filed under this order. One affidavit of complainant was filed on the day of the hearing and was not submitted to the adverse party. A portion of this affidavit, which was merely in rebuttal and contradictory of an affidavit which had been read in behalf of defendant the previous week, and the maker of which was not present, was excluded:

Held, that this was not error. The ruling of this court has gone to the extent of rejecting all affidavits not filed, and of which no notice has been given to the adverse party.

2. The failure of a tenant to pay rent gives the landlord the right of immediate re-entry and dispossession. Where a tenant holds possession of lands or tenements beyond the term for which they were rented or leased to him, or fails to pay the rent when due, and the owner shall desire possession, he has a plain remedy by warrant to dispossess such a tenant. The tenant may arrest the proceed-

s and prevent the removal by declaring that his term has not ired, or that the rent claimed is not due, and giving bond. Whether or not the act of 1866, authorizing the issuance of a wart to dispossess a tenant for non-payment of the rent, was origily subject to objection on the ground that it contained matter ts body different from what was expressed in its title, after this had been incorporated in Irwin's Code as a part of the statute of the state, and after that body of law had been recognized he by the constitution of 1868 and that of 1877, the laws so codicease to be amenable to such objection.

lations of independent covenants by a landlord will not require njunction to restrain a proceeding to dispossess a tenant hold-over; especially in the absence of any charge of insolvency.

ruary 27, 1883.

uity. Injunction. Landlord and Tenant. Constinal Law. Before Judge Hammond. Fulton county. hambers. January 20, 1883.

ported in the decision.

ON & GRESHAM; HAWKINS & HAWKINS; F. J. M., for plaintiff in error.

N. BROYLES; ABBOTT & GRAY, for defendant.

FORD, Justice.

e defendant in error, William Markham, on January 33, as landlord, sued out a warrant to dispossess Wm. off, his tenant, of certain premises therein described, the ground of the failure of the tenant to pay the when the same became due. This warrant was met e bill in equity which is the subject-matter of the off error in this case. The bill charges that the propen question was a hotel, and had been leased for the off five years, with the privilege of a renewal for a term of years that, in pursuance of said lease, the ancy of the premises by the tenant and the partner was then with him began; that the contract of lease the faithfully kept and performed by the lessees

during their joint occupancy, and by the present tenan since their dissolution; that, in order to realize a profi from the said premises, in view of the length of his term of lease, the present tenant proceeded to supply the said hotel with better furniture and accommodations than i had when it was taken charge of under the lease, and to improve the property in all respects, and continued to de so until he had expended the sum of about \$21,000, al of which had gone to add to the comfort and the improvement of the said hotel, and to make it more attractive to guests and patrons; that whilst he was thus appropriating his own means, the landlord not only failed to perform his part of the contract under the lease, but was engaged in doing him many other wrongs and injuries, all of which are specifically charged and fully set forth in complainant's bill of complaint, and from which said failure to perform his contract, and other wrongs and injuries committed by the landlord against the said tenant, he has been rendered unable to pay the rents due under the said lease as they become due and payable; that the said failure of the landlord to keep his covenants, and his injurious and wrongful conduct to complainant and his business, and the suing out of this warrant, have completely broken down the contract of lease in his favor, and made him liable to pay complainant as damages, all that he has put into said property on the faith of said landlord's covenant to be kept by him, as well as all damages suffered by reason thereof; and that, until this be done, the said landlord be enjoined from dispossessing him, and that a full accounting be had, and a decree rendered settling the rights and equities of both parties.

To this bill the respondent filed general and special demurrers, as also his answer; by the last of which he denied all the charges as set forth in complainant's bill against him, and prayed to be discharged, etc.

The parties supported the bill and answer by numerous affidavits, all of which are contained in the record, though

not material to be recited here. The chancellor, upon considering the bill, answer and affidavits, and after argument had thereon, refused the injunction prayed for, and the complainant excepted.

1. The first assignment of error is the refusal of the chancellor to allow an affidavit of the complainant to be read in full, as insisted upon by his counsel, and confining them to such parts only as the defendant, who was present, could reply to. The record shows that the hearing of the application had been continued from the 13th to the 19th day of January; and on the day of the continuance it was "ordered that, if either party desires to present additional affidavits, they be shown to the adverse party at least two days before the hearing." The affidavit offered was filed on the very day of the hearing, and the chancellor certifies that the portions excluded were solely in rebuttal and contradictory of an affidavit of one Rogers, which had been read the week before, and as it had not been submitted to the adverse party, as required by the order, he rejected it.

The rejection by the chancellor of the portions of the affidavit referred to was not erroneous; indeed the rule, as laid down by this court, goes to the extent of rejecting all affidavits not filed and of which no notice has been given to the adverse party. In the case of Boyce vs. Burchard, 21 Ga., 74, where affidavits were offered by complainant, at the hearing of the motion for granting injunction, in support of his bill, but of which he had given no notice to the opposite party, the circuit judge refused to receive them, and it was held by this court that his decision should not be disturbed. Benning, J., in delivering the opinion, said: "There must be a point at which aliunde supports to bill or answer must cease to be receivable. And this court sees in this case nothing going to show that the point selected by the court below was not as good a one as any other. Let the war of affidavits be ordered as it may, one party or the other has to be deprived of the last fire."

If the rejection of the affidavits were legal in the case cited, how much stronger is the case we are considering, in which there was an order directing that, if either party should desire to present additional affidavits, two days' notice thereof should be given to the adverse party.

We hold that there was no error in the ruling of the court; and especially so as Rogers was not present, to meet any new facts stated by complainant's affidavit.

2. The other assignments of error may be considered and disposed of together, involving, as they do, the right of the complainant to an injunction, and the refusal of a supersedeas unless the complainant gave a bond to pay all rents from the day of the denying of the injunction until the case could be heard and determined by this court.

By section 2285 of the Code, it is provided, among other things, that if a tenant fail to pay his rent at any time, the landlord may re-enter immediately and dispossess the By section 4077, it is provided that, in all cases where a tenant shall hold possession of lands or tenements over and beyond the term for which the same were rented or leased to him, or shall fail to pay the rent when the same shall become due, and the owner shall desire possession of the same, such owner may, by himself, his agent or attorney in fact, or attorney at law, demand the possession of the property so rented, and if the tenant refuses or omits to deliver possession when so demanded, upon oath of the facts, the officer before whom such affidavit is made shall grant and issue a warrant, directed to the sheriff, his deputy, or any lawful constable, commanding and requiring him to deliver to the owner or his representative full and quiet possession of the lands or tenements mentioned in the affidavit, removing the tenant with his property away from the premises.

By section 4079, the tenant may arrest the proceedings and prevent the removal, by declaring on oath that his term has not expired, or that the rent claimed is not due, *provided*, such tenant shall at the same time tender

ond, with good security, payable to the landlord, for the ment of such sum, with costs, as may be recovered inst him on the trial of the case.

these provisions of the law give to the defendant in or a clear and indisputable right to the warrant which sued out, with rights equally clear and indisputable in complainant to arrest the proceedings.

but it is claimed by the learned counsel for the comnant that the act of 1866 authorizing the issuance warrant to dispossess a tenant for the non-payment ent is unconstitutional, in that it contains matter in body different from what is expressed in the title eof. Conceding that the act originally may have been ject to this objection, it could not possibly have coned to exist after its incorporation into Irwin's Code as art of the statute law of the state, and when by Art. par. 3, of the constitution of 1868, it was ordained and ared, that, "All acts passed by any legislative body ng in this state since the 19th day of January, 1861, uding that body of laws known as the Code of Georgia, the acts amendatory thereof, or passed since that time, ch said Code and acts are embodied in the printed book wn as Irwin's Code, shall be next in authority in this e after the constitution of the United States and laws sed in pursuance thereof, and the constitution of the e of Georgia."

and again, by the constitution of 1877, was this same declared to be of force. If, therefore, it be not constitutional, none, it seems to us, could be made so.

But it is further said that, even if this act be conational, it cannot apply to such a contract as this. We at a loss to know why it does not apply; upon the cony, whenever the relation of landlord and tenant exists, rents are due and unpaid, this statutory remedy also sts. Indeed the act declares, in all cases where a tenshall hold possession of lands or tenements beyond the in for which the same were rented or leased, or shall fail

to pay the rent when the same shall become due, etc., this remedy exists. If then it does not apply to such a case as that which is sought to be enjoined by this bill, the reason why it does not surpasses our comprehension.

With this complete statutory right in one to proceed and the other to arrest the warrant to dispossess, what is there charged in the bill to deprive either the landlord or the tenant of the enforcement or preservation of their respective rights? That different legal rules may obtain elsewhere, cannot affect this case; the courts of this state are governed by the laws of the state; and even equity with its broad protective powers, cannot violate law; it only aids where the law is deficient; "it is its ally, not its enemy."

In looking at this case, and the decision of the chancellor complained of as error, it is to be borne in mind that it is alone with the refusal of an injunction with which we are dealing. The plaintiff in error claims that he has been greatly damaged by the defendant in error by his non-performance of his part of the contract of lease, and by other wrongs and injuries growing out of the acts of the said defendant, in connection therewith, and this is the response he makes to the legal proceeding sued out against him for the non-payment of rent due under the contract.

That these are independent covenants, with ample remedies at law for the protection of the rights of the parties, has been repeatedly held by this court. But it is insisted that any breach of the contract, express or implied, resulting in damages to complainant, whether liquidated or not, should be inquired into and settled in this suit, and, to that end, the proceedings at law should be enjoined until a final decree could be had upon all the matters involved; and especially where the contract requires expenditures on the one side, and allowance therefor on the other; or where there are accounts, claims and damages claimed against the lessor in favor of the lessee, which ought to be allowed in liquidation of rent.

very similar question to the one here presented, has decided by this court in the case of Hall vs. Holmes pife, 42 Ga., 179, and which case arose under the section of the Code, and involved, save in amounts, t the identical facts which bring this case before us. the complainant rented a hotel, agreeing to pay the n monthly instalments, and upon his failure to pay fth instalment, the landlord resorted to his statutory ly for his removal from the premises. nis bill, alleging that the contract of rent was upon tion that the landlord would repair the premises and them comfortable for the guests; but that he had one so, and they were not tenantable, and that he een thereby damaged in a large sum of money; that ndlord was insolvent, and the tenant, by reason of overty, unable to give bond and security on filing a er-affidavit, as required by law; and, therefore, he d an injunction restraining the landlord from turnm out of possession until the final hearing of the bill, ffered to deposit the monthly rents in the hands of a er, to be appointed by the court. The bill was disd on demurrer, and by writ of error, the case brought or review. Warner, J., in delivering the opinion of ourt, said: "There was no error in sustaining the deer to the complainant's bill. Inasmuch as the law makes ception as to the eviction of a tenant who is unable to ond and security, on account of his poverty, a court of y cannot make one, but is as much bound by the positive f the land in such cases as a court of law would be y follows the law, where the rule of law is applicable. he analogy of the law where no rule is directly apole. Code, §3028. The statute law of the state in on to landlord and tenant, cannot be altered or ed by simply changing the forum in which the remsought."

It is true that in the present case there is no allegation the inability of the tenant to give security, as required by the statute, and if there were, it would not, as we have seed change the law. But if an injunction was properly refuse under the facts alleged in the case of Hall vs. Holmes am wife, supra, where it was alleged that the landlord was insovent and unable to answer for the damages sustained by the tenant, and where the tenant offered to pay to a receive appointed by the court, the monthly instalments due for rent, how much more so was the refusal in this case, when it appears that the landlord is solvent, and where there no offer to pay the rents as they become due, but on the contrary, error assigned because their payment was required!

Had this bill been dismissed for want of equity, as that dismissal assigned as error, the question before us would have been materially changed from that which here presented. The chancellor refused the injunction upon the ground that "the amount of damage to the term and by the landlord's failure to comply with his cross obligations under the lease were not considerable enough as shown by the evidence, to authorize him to believe that a multiplicity of suits would probably arise by allowing the landlord to pursue his statutory remedy."

This is the real error complained of, and in passing upon it, we do not think it either necessary or proper to decide other questions which are not legally before us at the time for adjudication.

Judgment affirmed.

Crittenden Brothers et al. vs. Coleman & Company et al.

ENDEN BROTHERS et al. vs. COLEMAN & COMPANY et al.

I his case was argued at the last term, and the decision reserved.]

the facts and circumstances before the chancellor in this case, was sufficient to authorize the grant of the injunction and intment of a receiver.

e act of 1881, on the subject of voluntary assignments by inent debtors for the benefit of creditors, must be construed liby in favor of creditors, for whose benefit it was enacted, and
thy against the debtor and assignee. It is essential to the
s of creditors that the schedule of property assigned be
out specifically, so that it may be seen if the assignment
rs property sold by them, and whether, by reason of fraud in
debtor, they can claim title thereto. This schedule must be
out and attached to the deed of assignment at the time of
eccution. It will not be sufficient to prepare a schedule afteris and fold it within the deed.

mary 27, 1888.

nction and Receiver. Debtor and Creditor. Incy. Before Judge CLARKE. Randolph County. ambers. January 6, 1883.

orted in the decision.

NON & RAMBO; A. HOOD, Sr., for plaintiffs in error.

D. Kiddoo; A. Hood, Jr.; Thomas Willingham, for lants.

on, Chief Justice.

a:

is a writ of error to an injunction and the appointof a receiver. On the grant of such an order, this will not control the discretion of the chancellor on ted facts, unless it has been abused.

m the bill, answers and affidavits before the chancelese facts are made out by the complainant, though everted by the defendants, and they are sufficiently it to show that the chancellor has not abused his disCrittenden Brothers et al. vs. Coleman & Company et al.

That complainants are creditors of Lane & Comp that defendants were engaged in mercantile busine Ward's station in Randolph county in 1881 and 1 that on representation of their solvency and assets, a were sold them by some of complainants in the fa 1882; that an assignment was attempted to be made the assets of Lane & Company, but is illegal because schedule was made out and attached thereto, in accord with the act of 1880-81, page 74; that the assignment made to R. E. Kennon, the counsel of Lane & Comp and brother-in-law of one of the firm; that the prefe creditor is Mrs. Lane, the wife of one of the firm and s of the assignee's wife; that the notes to her were r the 7th of September, 1882, and mortgage to secure t the same day, of all the goods; that the assignee at sold out all the goods to Crittenden Brothers, also chants at Ward Station, in a lump and in great haste, discount; that Crittenden Brothers have mixed, as themselves allege, these goods with their own, immedia on their receipt; that one-third cash, one-third at thirty one-third at sixty days, are the terms of sale; that I sums have been already paid in cash on said notes to Lane, and acceptances turned over to her by Kennon, assignee; that there is complicity between the assignee Crittenden Brothers and Lane & Company, to hinder, lay and defeat creditors, who are complainants; that s of the creditors hold collaterals in respect to some eff which have been assigned to Kennon; that the debt alle as due Mrs. Lane is attacked as fraudulent; that the is composed of A. Lane, and his son, agent, and a si time before the assignment, this large indebtedness several thousand dollars is made by note and mortgag the wife and mother; and that complainants, on these f and charges, make a case for equitable interference by junction and receiver

The legal question is, are these facts, if true, sufficient authorize equity, to interpose an injunction and appoint receiver.

Crittenden Brothers et al. vs. Coleman & Company et al.

e assignment is made in a hurry. The sale to Criten Brothers as hurriedly. The schedule seems to have completed after this transaction. It was not, thereattached to the assignment when made. The assignee. alleged, is in complicity with his relatives. The credwere induced to sell portions of the goods to Lane & pany, on their false and fraudulent representation of assets and perfect solvency, and yet they are insolventassignee has thus sold to Crittenden Brothers goods h belonged to complainants, because title never passed, and procured the sale. Crittenden Brothers immedimixed the goods with their own, when delivered to . They were neighbors of Lane & Company in merle business, and should have looked into matters bethey bought and thus hastily mixed the new purchase their own goods, and must have known or suspected something illegal was on hand. They should have fined the title of the assignee before their purchase, out the knowledge of the creditors or any of them whom the goods were purchased. They bought, it s, as soon as, if not before, the assignment was comd. These deductions the chancellor may have legally from the facts; and, in their light, he did not err in the appointing a receiver, under good bond, to take ge of everything, and collect and distribute the fund r such decree as should be finally made—the order acing the goods sold to Crittenden Brothers, as well I the mortgages and evidences of debt of all sorts in ands of the assignee and afterwards the temporary ver, Kennon, and in enjoining the said assignee and orary receiver from further action in the premises, emporary appointment being rescinded, and in enjoinrittenden Brothers from making any other disposition e goods of Lane & Company, so conveyed by the nee to them. 8 Ga., 511; 42 Ib., 46; 57 Ib., 247 · 58 50; Acts of 1880-81, p. 574.

Crittenden Brothers et al. ve. Coleman & Company et al.

The principles ruled in the cases above cited, fix these circumstances as equitable grounds for interposition. Those principles are the allegations of complicity of the assignee and the circumstances pointing thereto; the fraudulent representations of Lane & Company in the procurement of the goods of complainants, by which it is claimed the title to Lane & Co. did not pass, but remained in complainants, the allegation of complicity of Crittenden Brothers therein, fortified by their failure to examine into the assignment and its validity; the proximity of their mercantile residence to Lane & Co.: the haste of their purchase at private sale, and the instantaneous mixing of the purchased goods with their own stock the large debt to Mrs. Lane, the wife of the real man of the firm, the other being a mere agent and son, put in the form of notes and secured by mortgage on the entire stock a short time prior to the assignment, all tending to show fraud in the assignment; and then, above all, the failure to attach the schedule to the deed at the time of the assignment. act of 1881 is a great remedial statute, and must be construed liberally in behalf of creditors, for whose protection it was enacted, and strictly against the debtor and assignee. It is essential to rights of creditors that the schedule of whatever is assigned, be made out specifically, so that creditors may see what has been assigned and what goods they sold are among those assigned, and whether, by reason of fraud in the debtor, they can claim title thereto. Unless this schedule be attached, not loosely folded with the deed of assignment, the entire policy and force of this remedial statute will be destroyed. If an assignment be fraudulently made, it will be quite easy to change a loosely folded schedule, and the contest between creditors and debtor making assignment of all he possesses, is always fraud or no fraud. Therefore, we hold that, under this statute, the schedule must be made out and attached to the deed as part thereof and essential to its validity, at the time of its execution. It will not do to take stock and fix Shelton & Company vs. Ellis et al.

afterwards, nor so to fix it up as to take it off the d libitum. I must be attached to it.

do not say what may be the proof on the final hearall the testimony. All we now determine is, that cts and circumstances in the hearing before the llor, are sufficient to authorize his action in the of the injunction and the appointment of the re-

gment affirmed.

## SHELTON & COMPANY vs. Ellis et al.

naking a contract of sale, a mistake has been made by one and a fraudulent advantage has been knowingly taken of nistake by the opposite party, to his gain and the serious detect and injury of the party making the mistake, a court of y will grant appropriate relief.

on the questions of fact the evidence was conflicting, and was no abuse of discretion in holding that the case should be ed upon by a jury.

a upon by a jury.

24, 1883.

ity. Fraud. Contracts. Before Judge HILLYER. County. At Chambers. April 28, 1882.

s filed his bill against Garland, Shelton and Stokes ag, in brief, as follows: Complainant was employed veral railroads, among them the Western and tic Railroad, to compile what are known as rate, giving the cost of tickets between different. In publishing this rate sheet, the fare from At-Georgia, to Rogers, Arkansas, was, by mistake, d \$21.25, when it should have been \$36.70. The deats having discovered this mistake, and intending to be and defraud complainant, went to Adair, the ticket of the Western and Atlantic Railroad, and Garland ented that he desired ten tickets for laborers or emi-, and purchased that number at the price of \$21.25

Shelton & Company w. Ellis et al.

This occurred about midnight on April 15, 1882. On the next morning, during the absence of Adair, Garland, through himself or his confederates, purchased from Plane, Adair's assistant, fifty-five more of these tickets. again making the false representations as to laborers or emigrants. Complainant is responsible to the railroad for the mistake in the rate sheet. He offered to refund the money paid for the tickets, but the offer was refused. Defendants are trying to sell the tickets. Garland is insolvent. Defendants knew of the mistake in the rate sheet, and the presentations stated were falsely and fraudulently made to procure the tickets. The prayer was for an injunction to prevent the sale of the tickets and for the appointment of a receiver to hold them. By amendment, the Western and Atlantic Railroad was made a party complainant.

Defendants answered, in brief, as follows: Shelton and Stokes are partners, under the name of Shelton & Com-They are ticket brokers, and a portion of their business is to purchase cheap tickets and sell them for higher Where a through ticket is for passage over a long route, they can frequently make a profit by selling passage to some point on the line at an advanced rate and retaining the balance of the ticket, through their connections in The railroads object to selling tickets to different cities. the brokers, and especially does the Western and Atlantic do so, its agent being unfriendly to Shelton & Company. If the railroads discover that the brokers are using particular tickets to any considerable extent, they put the price up. The different railroads in Atlanta issue a monthly rate sheet, showing prices and the character of tickets from Atlanta to all points, and these prices are changed from These rate sheets are usually furnished to time to time. the brokers by some passenger agent, and the brokers determine from it what tickets they can use advantageously. They so determined in regard to the tickets from Atlanta to Rogers, Arkansas. Garland was a travelling salesman. Shelton & Company vs. Ellis et al.

hen in Atlanta often called on Shelton & Company. called on April 5, 1882, and Shelton & Company, explaining to him the difficulty which they exped in buying tickets, asked him to purchase for them tickets from Atlanta to Rogers. He was not fawith the rate sheet or the business of the brokers. ould have bought the tickets on the afternoon of 5, instead of at night, had the money been furnished He went to the ticket office at the regular hour for ng the same, about eleven and one-half o'clock P. M., sked for tickets to Rogers, Arkansas, what was their and if they were first-class and unlimited. The replied in the affirmative, and stated the price to be each. Garland called for ten. The agent said here must be some mistake in the price. im to look well and not to receive his money and ay that there was something wrong about the tick-The agent examined the rate sheets and said that the was so stated there, and his instructions were to sell em. He also looked into a book, and said that some se tickets had been sold. While preparing the s for delivery, he asked Garland what he wanted o many tickets to one point. The latter responded, is a leading question and ruled out of court." ivered the tickets, the agent again asked Garland the question. The latter considered the question iment, but not desiring to answer harshly, replied in a r manner, "I have gone into a combination to settle e whole of northwestern Arkansas." The tickets noney had then been delivered and were being ed. Garland proposed to buy more tickets that but the agent said that it was late and he wanted to me, but Garland could get them next morning. On ext morning, Garland went to the ticket office and ased from the assistant agent fifty-five more of these s. While he was purchasing them, the agent of a f railroads connecting with the same point, but dif-▼ 70-20

Shelton & Company ve. Ellis et al.

ferent from that over which Garland was purchasing ti ets, proposed to sell him tickets at the same price, look at the rate sheet to ascertain the price. After the tick were delivered, but while still at the ticket window, conversation was continued, and in the course of it, jocu remarks, similar to that stated above about settling nor western Arkansas, were made. Garland proposed to b all the remaining tickets to Rogers which the agent h but on returning later during the same day, he was formed that the price was \$31.00, and thereupon declin to buy. The sales were not made on account of any n representations to the agents, but were made from th own rate sheets; nor were any false or fraudulent rep sentations made; nor did the defendants know that the was any mistake in the rate sheets. Shelton & Compa merely discovered that the tickets were cheap, and decid that they could use them advantageously. The rate she for five consecutive months stated the same price for the tickets.

The court granted a temporary injunction, and appoint a receiver. Defendants failed to deliver the tickets to he and a proceeding to attach them was begun. In sponse it was shown that the tickets were in the hands one Wilson, who had furnished the money for their pechase. He was made a party and ordered to deliver the to the receiver. Conflicting affidavits, which need not set out here, were introduced in support of the bill a answer. Defendants excepted to the grant of the injunction and appointment of the receiver.

MYNATT & Howell, for plaintiffs in error.

W. F. WRIGHT, for defendants.

HALL, Justice.

There is no question made here as to the propriety the orders passed by his honor, the presiding judge, if t



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made by the bill entitles the complainants to the relief ed. Upon the question made there was a conflict of ence; there was no abuse of discretion, if the law orized the interposition of the judge. The order apting the receiver and directing the injunction carefully erved the rights of all the parties to the final hearing are cause.

the first and only question made which we shall ider and determine, is whether appropriate relief can ranted by a court of equity, in a case where there has a mistake on one side, and it is alleged that a fraudt advantage has been knowingly taken of this mistake the opposite party, to his gain and to the serious detrit and injury of the party making the mistake. The tion is thus broadly stated, to meet the views presented ounsel in the case.

Wyche et al. vs. Greene, 26 Ga., 415, this court held what is a mistake on one side and a fraud on the r is as much the subject of correction as if it were a ake on both sides, and in delivering the opinion of ourt, Benning, J., (at p. 122) said: "The court's charge a mistake, to be the subject of correction, must be a ake in which all the parties to the contract participate. too absolute. If one of the parties to a contract is aken in a matter, and the others know that he is and ot apprise him of it, yet the mistake, though not one neir part, is the subject of correction. es one in which there is a mistake in one of the parto the contract and a fraud in the others. en more readily the subject of relief, at his instance, is a case in which there is nothing but a mistake, ough that be a mistake extending to all the parties." e is nothing that we are aware of, either in the Code y subsequent decision of this court, modifying the law re declared. On the other hand, we think there is confirming the view here taken. Compare with this §§3117, 3119 to 3126, both inclusive, and 3180. The

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conditions upon which relief will be granted or denied munder the sections of the Code and the cases cited unthem, depend in large measure upon the circumstances each particular case, and upon all the facts develop which should be passed upon by the jury at the final he ing, and ought not to be too closely scrutinized or ever balanced in these preliminary proceedings. All that judge decides at that stage of the cause is that there enough developed to carry the case to the jury, whexclusive province it is to determine the force and effect facts as applied to the law given them in charge by court. This is all that the judge has undertaken in tease.

Judgment affirmed.

## THE PLANTERS' LOAN AND SAVINGS BANK vs. JOHNSON et

- 1. In 1858 and 1859 free persons of color were not permitted to or own real estate in the city of Augusta, nor could they acquired beneficial interest therein; and, therefore, a free person of color then sought to purchase real estate, paid part of the purch money, and took receipts stating that the payments were so manacquired neither absolute title nor color of title, and could proper to his heirs at his death.
- 2. Were this otherwise, the wife having received a deed in her of name after the death of the husband, and, after holding possess for a number of years, having sold to a bona fide purchaser with notice, he would acquire a good title as against the children of decedent, who claimed under him by inheritance.
  (a.) After one has sold realty to a bona fide purchaser without not
- (a.) After one has sold realty to a bona fide purchaser without not that subsequently a suit is brought against the vendor for the covery of such property will not affect the prior vendee, under doctrine of lis pendens; nor would such action adversely affer purchaser from such vendee, although such purchaser might he been chargeable with notice of the pending suit.

April 17, 1883.

Title. Contracts. Slaves. Notice. Lis pendens. I fore Judge SNEAD. Richmond Superior Court. October Term, 1882.

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orted in the decision.

Z. McCord; J. S. & W. T. Davidson, for plaintiff in

EM DUTCHER, for defendants.

FORD, Justice.

s case comes up upon the first grant of a new trial, and ling to the uniform ruling of this court, the judgment ing it will not be disturbed, unless the verdict was aded under the law and the evidence. The plaintiff or claims that this case falls clearly within the rule, neeefore insists that the judgment be reversed.

suit was brought by the defendants in error, to rethree-fourths interest in a certain lot of land in the f Augusta. They rest their title upon a parol purmade by their father in 1858 or in 1859, with possesup to 1878, under color of title. This color of title sts of three receipts of one hundred dollars each. "in part payment of a lot on Calhoun street, now pied by Peter Johnson," and two others for twenty twenty-five dollars, without designating for what the amounts were paid. The three first were given in ary, March and April, 1862, and the two last in June September, 1865, aggregating \$345, and leaving only lue, which the wife of Peter Johnson, and mother of laintiffs, claims to have paid out of the estate of the Peter, after his death in February, 1866. of this payment, to-wit: in October, 1866, a deed was by Richard Maher, the vendor, to Martha A. Johnwife of the said Peter, and the mother of the plain-This deed was recorded October 6, 1866, and the

This deed was recorded October 6, 1866, and the er and her said children continued to reside on the lot until the year 1878.

e defendant below defended its title upon the ground it was a bona fide purchaser for value, without notice

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of the plaintiffs' claim, and held under a regular chain of title from the said Martha A. Johnson.

The testimony shows that the said Martha A. conveyed this lot to one Charles J. Denham, in January, 1876; deep properly recorded; consideration \$700; he re-conveyed ther, in February, 1877, taking a mortgage to secure the payment of \$414, with power to sell and convey titled purchaser; sale made pursuant to the power to J. W. Ralliff, with deed, January, 1878; then sale to C. J. Denham August, 1878, with warranty deed by Ratliff; next deef from Denham to W. M. Wilkerson, June, 1878; and deef from Wilkerson to the defendant, February, 1880, all which deeds were duly recorded.

It further appears that the said Peter Johnson was free person of color, and that his children, the plaintif brought suit June 30, 1879, against C. J. Denham, f three-fourths of the value of this lot, which suit was afterwards dismissed.

With the foregoing facts, and some others not mater to be recited here, the jury, under the charge of the coureturned a verdict for the defendant, and the plaintimoved for a new trial, which was granted and the defenant excepted.

We think that the judge below erred in setting as the verdict, and granting a new trial, because, under the law and evidence none other should have been render. The plaintiffs in this case claim title as the heirs at he of Peter Johnson, a free person of color, who, it is allege bought the land in controversy in 1858 or 1859, and he it for seven years under color of title. It will be set upon examination, that, at the time mentioned, free posons of color were not permitted to buy or own real estain the city of Augusta.

The act of 1818 declares that persons of this class should be permitted to purchase or acquire any real estate either by direct conveyance to themselves, or to any who person reserving the beneficial interest therein, by a

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teither written or parol, by any will or deed, or by any ract, agreement or stipulation, securing or attempting ecure to such free persons of color the legal title, or itable or beneficial interest therein, but that all and ular such real estate shall be deemed and held to be lly forfeited. It was further declared that all persons should be concerned in covering or protecting such perty, so as to secure, or attempt to secure, the legal equitable title therein to a free person of color, con y to the true intent and meaning of the act, should be le to a penalty not exceeding one thousand dollars. Cobb's Dig., 993.

1819, the foregoing clause in the act of 1818 was reled as to all other parts of the state except the cities of annah, Augusta and Darien. *Ib.*, 995.

that, as the law stood at the time of this pretended chase, the ancestor of the plaintiffs could derive neither plute nor color of title to any real estate in the city of gusta, and consequently could pass none to his heirs.

Even if this were not so, and they could inherit from, the record shows that Wilkerson, the feoffor of the endant below, was a bona fide purchaser without notice he claim now set up to this land. The possession and title were both in Martha A. Johnson, in October, 6. and remained so continuously for some twelve years, ept as used by her to secure debts, when by deed she veyed it away, and her feoffee conveyed it to Wilker, who afterwards conveyed it to the defendant.

t is sought, however, to bring notice home to these ties, by showing that the plaintiffs below brought suit he superior court of Richmond county against Denfor the three-fourths value of this land, the declarate setting up substantially the same facts here relied in. The complete answer to which is, that the purse by Wilkerson was made before the said suit was ught, and of course the doctrine of lis pendens could apply to him. And if it could not be made applica-

Pendleton, for use, vs. Andrews, admini-trator.

ble to him, he being an innocent purchaser without notice, the defendant, who was his feoffee with warranty, could not be affected adversely, although it might have been chargeable with notice of the pending suit. And this, because a recovery against the defendant would be nothing but a recovery against Wilkerson, its warrantor.

So that, under no view of the facts presented by this record, would the plaintiffs below be entitled to a recovery from this defendant of the land sued for, and the setting aside the verdict was error.

Judgment reversed.

Pendleton, for use, vs. Andrews, administrator.

A note became due November 1st, 1874; the maker died July 21, 1875 an administrator qualified May 3, and died September 1st, 1880; an administrator de bonis non qualified May 2, 1881; suit was brought January 24, 1882:

Held, that the suit was barred by the statute of limitations. The statute was not suspended on account of the death of the debtor and the non-representation of his estate, except for the twelve months during which his administrator was exempt from suit.

(a.) Section 2829 of the Code cannot be invoked by a creditor whose debtor dies, in order to prevent the statute of limitations from running. That section provides for the suspension of the statute for five years when the plaintiff dies, and his estate is unrepresented; but does not suspend the statute in favor of one who hold a claim against such estate.

April 24, 1888.

Statute of Limitations. Administrators and Executors Debtor and Creditor. Before Judge Pottle. Hancock Superior Court. October Term, 1882.

Reported in the decision.

- J. T. JORDAN, by brief, for plaintiff in error.
- R. H. Lewis, for defendant.

Pendleton, for use, vs. Andrews, administrator.

wford, Justice.

nis suit was brought by the plaintiff in error upon a nissory note, made by the intestate, of the defendant error. The defence relied upon was the statute of limons, and the decision excepted to made upon the folng agreed statement of facts;

W. S. Dickson made the note sued on March 21, 1874,

first day of November thereafter. nty-first day of July, 1875. A. B. Buckner qualified rst administrator third of May, 1880, and died 21st tember, 1880. J. T. Andrews, defendant, qualified as inistrator de bonis non second day of May, 1881, and suit was filed twenty-fourth day of January, 1882." rom this statement, it will be seen that the note sued ell due November 1, 1874; that Dickson died July 21, i; and that at the time of his death the statute had eight months and twenty-one days. The first admintor qualified May 3d, 1880, so that, at the time of his ification, five years, five months and three days had sed from the maturity of the note. He only lived months and eighteen days, and the administrator de s non was not appointed until May 2, 1881. w twelve months to the estate of Dickson before his inistrator could have been sued, would extend the seven months and twelve days longer; that is, to the teenth day of December, 1881; and the suit was not ght until January 24, 1882, or one month and ten after the right of action had accrued against the inistrator. It further appears from these different s, that the whole time from the maturity of the note ne filing of the suit was seven years, two months and ity-four days. Taking out, then, the twelve months in ch the creditor was not allowed to sue, there remained vears, two months and twenty-four days of time that note was overdue.

nder these facts, the court held that the note was barred, that judgment is assigned as error.

Pendleton, for use, vs. Andrews, administrator.

It is insisted by the plaintiff in error that section 2920 of the Code can be invoked in his behalf to relieve this note of the bar of the statute. The reply to this is, tha that section applies to cases only where the plaintiff dies and where, the cause of action being in him, the suit is no brought within the time therein prescribed, on accoun of the disabilities therein named; then that in such case the statute of limitations shall not bar the plaintiff's caus In other words, that the failure of an unrep resented estate to sue, unless such failure exceed a certain limited time, shall not be counted against the estate dur ing the time of such want of representation, whilst the effort here is to have the time counted in favor, not of a estate at all, but of the original living plaintiff, and agains the administrator of a deceased promissor of the note sued That is, the plaintiff seeks to avail himself of facts exist ing as to the defendant, which, had they existed with him would have created a disability, and thereby suspended the running of the statute and saved its bar. But unfor tunately for him the law invoked is applicable alone to plaintiff creditors, and not to defendant debtors.

This section is but the codification of sections 21 and 40 of the act of March 6th, 1856, and was modified so as to be applicable to plaintiffs or parties having a cause of action, and who always have it in their power to preven the running of the statute of limitations in favor of their debtors, by administering or forcing an administration upon their estates. It doubtless means just what it says which is that the statute of limitations, except as therein provided, shall not run against an unrepresented estate having a cause of action. But there is nothing contained in it which prohibits the running of the statute against the common creditors of an estate, just as it does against other persons, except for the twelve months in which suits are prohibited.

This view, we think, is in harmony with the decision in the

Holmes, trustee, et al. vs. Harris et al.

we of Simmons vs. Moseley, 55 Ga., 35, and the cases we cited from the 11th Ga., 651, 653, and 19th Ga., 316. Independent affirmed.

# Holmes, trustee, et al. vs. HARRIS ct al.

An execution issued under a decree in equity and specified the property to be sold. It was trust property, and after the levy thereon by the sheriff, a bill was filed on behalf of the beneficiaries, alleging that there was a reversion after the termination of the life estates, and praying an injunction to restrain the sale under the f. fa. until this reversionary interest should be declared and protected. The injunction was refused; but, with the consent of the opposing side, the chancellor required the sale of the property to be reported to him by the sheriff for confirmation, before making a deed thereto. Notice of this requirement was given at the sale, and the purchaser bought with such notice:

d, that the chancellor had power to require the sale to be reported to him for confirmation, and nothing vested in the purchaser until the sale was confirmed. Therefore, the purchaser cannot complain of a refusal by the chancellor to confirm the sale because of madequacy of price. Nor have the beneficiaries of the trust any right to complain, because it was at their instance and for their protection that the order was so framed, when the f. fa. was ordered to proceed.

The refusal of an injunction not being an error on the matters of www, and no abuse of discretion on the matters of fact appearing, this court will not reverse the decision of the chancellor.

March 27, 1883.

Judgments. Decrees. Sales. Sheriffs. Equity. Bee Judge Simmons. Bibb County. At Chambers. Februry 27, 1883.

Reported in the decision.

Lyon & Gresham, for plaintiffs in error.

R. K. HINES; A. PROUDFIT, for defendants.

AWFORD, Justice.

friend, etc., was the complainant, and Gibbons M. Taylo

said Taylor.

Holmes, trustee, et al. vs. Harris et al.

In an equity cause in which Joseph M. Boardman, ner

and Charles T. Holmes, as trustee, etc., were defendants, final decree was entered up against the said Charles T., trustee, for a certain sum therein named. This sum was be collected by levy of execution to be issued on the said decree, and a sale of the property described in the decreected by the said Holmes, as trustee, and Mrs. E. Watkins and Georgia A. Holmes, in favor of the said Tallor, and also described in the answer and cross-bill of the

In pursuance of the said decree an execution was issue

and levied, and the property advertised for sale. While the said levy and advertisement were pending, the beneficiaries, to whom the property so levied on and charged with said debt belonged, sought by bill to enjoin the sale, but which at the hearing was refused by the chancellor, and the sale ordered to proceed. At the same time, and it the same hearing it was "Ordered, that upon a sale said property by the sheriff under said for fac, that he report the same to the chancellor before making a decidereto, for confirmation," and that the said order be expected.

The sheriff, under the fi. fa. and order aforesaid, proceeded to sell the said property on the first Tuesday is January, 1883, when it was knocked off to one R. Henry, at the sum of \$2,500, which said sale the charcellor refused to confirm, because of the inadequacy of price as compared with the actual value of the property Upon this refusal to confirm the sale, the property was

tered on the minutes of Bibb superior court.

re-advertised to be sold on the first Tuesday in February 1883, when it was re-sold and bought by Mrs. A. W. Harrat \$3,325, and the same reported to the chancellor for confirmation. Mrs. A. E. Watkins and Mrs. Georgia A Holmes appeared before the chancellor by their counse and objected to the confirmation of this sale, upon the ground that the property was worth much more than

Holmes, trustee, et al. vs. Harris et al.

ught. They furthermore stated that they had then sent in court Mr. Edward Hueguenin, a responsible son, who would give \$4,000 for the property, if his orney, who was then temporarily absent, would say that title was good. Application was also made to delay confirmation of the sale until the return of the said orney, which the chancellor refused. By consent, the nucellor heard the statement of the sheriff, which was to the sale was fairly made, well attended, and that Mr. ward Hueguenin was present, but did not bid. The nucellor then confirmed the sale.

t is charged in complainants' bill that, at the first sale the sheriff, an arrangement had been made by Holmes, trustee, with R. L. Henry, to attend, buy in the propy, pay the money, take a deed, and when the purchase ney should be refunded with reasonable interest, and a hundred and fifty dollars additional, he would re-contract the property to the trustee. And further, that after confirmation of the sale to Harris, Hueguenin gave rris \$4,500 for the property, and took a quit-claim deed reto, both parties having notice of the facts set out. The bill now before us was filed to set aside the last e, and to declare the first a legal and valid sale of said perty, and that it passed the whole title to the purser for the purposes and uses aforesaid. It prays an anction against Hueguenin and Harris's taking posses-

s brought the case to this court.

The question of law presented by this record is, ether the chancellor had the authority to pass the order uiring the sheriff to report the sale to him for confirming. The sale was made under an execution issued upon ecree entered up by the chancellor, and specified the perty to be sold. The property was trust property, and are the levy thereon by the sheriff, a bill was filed by the stee et al., setting up that there was a reversion thereof

n under the last sale, and the cancellation of their deeds. e chancellor refused the injunction, and the complainHolmes, trustee, et al. vs. Harris et al.

after the termination of the life estates, and prayed a injunction against the sale under the ft. fa. until this re versionary interest should be declared and protected. This injunction was refused, but with the same parties and th same subject-matter before the chancellor, and for reason then urged upon his consideration by the parties now com plaining, and by the consent of the other side, as show in this record, he required the sale of the premises to b reported to him for confirmation before making the deed The notice of this requirement was given at the sale, an Henry, the purchaser, bought with such notice. Being sale under a decree in chancery, although enforced by ex ecution, there is no question of the power of the chance ler to order the sheriff, who is but a commissioner quoa hoc to execute his decrees, to report back the sale for con And a large discretion is vested in him i passing on these equity sales. In this, there was a special order that the sale was not to be final until after it was confirmed. Rorer on Judicial Sales, page 1, on authorit cited, declares that, "It matters not that it is made through the instrumentality of a master, commissioner or other functionary, appointed by the court." And we think that if a sale is made under a decree which requires it to b approved by the court, it matters not that the functionar who makes is not appointed by the court, but by the law as he is equally bound, and the confirmation quite as neces sary as if his appointment had been made specifically by th chancellor for that purpose. But however this may b generally, he, in legal effect, was so appointed in this case and the purchaser bought with full notice that his bid wa subject to confirmation. He has no right, therefore, to com plain, as nothing vested in him until the chancellor passed on the sale. Nor have the beneficiaries any right to com plain, for it was at their instance and for their protection that the order was so framed when the fi. fa. was ordered to proceed.

2. Upon the question of fact submitted to the chancello

Cohen & Company et al. vs. Morris & Company et al.

charged in complainants' bill, he does not, it seems, them satisfactorily supported by the proofs offered. did the first purchaser consent to bind himself legally ne performance of the bargain alleged to have been ed upon at the sale, and as claimed by complainants he would. So that the refusal of the injunction not g an error of the matters of law set up in the bill, and buse of discretion on the matter of fact appertaining eto, it must be affirmed.

idgment affirmed.

# OHEN & COMPANY et al. vs. Morris & Company et al.

here insolvent debtors have made an assignment for the benefit their creditors, setting out in the deed of assignment the names such creditors and the amounts due them, the persons so named ecestuis que trust, and although they may not be preferred credits, they are interested in a just administration of the trust, and e entitled to equitable relief in case of mismanagement, waste violation of the trust by the assignees.

a trustee mismanages and wastes the property entrusted to him ad persists in so doing, injunction and appointment of a receiver the proper remedy.

The judgment of the court removing one of the assignees charged be in full complicity with the debtors, investing the other with antrol of the property as receiver, and requiring a small bond of m, was a mild use of discretion.

hough a creditor may not have reduced his claim to judgment, at where his debtors, who are insolvent both as a firm and indidually, have set out his debt and the amount thereof in a deed assignment made by them, and the debt is undisputed, he may sail the assignment as fraudulent, and may seek to set it aside to property obtained from him by fraudulent representations ith which the assignees are connected.

In this case it is alleged that some of the goods covered by the signment were never sold at all, but were delivered to the asgnors for inspection and a selection of such as they would buy, ad a recovery of these, or the proceeds thereof, is sought. Under e facts, the remedy is more complete in equity than at law.

Whether on the final hearing complainants can both attack the signment as fraudulent, and also claim under it, or whether they ill be compelled to elect between these two rights, is not ow decided.

arch 18, 1883.

Cohen & Company et al. vs. Morris & Company et al.

Debtor and Creditor. Insolvency. Injunction and Receiver. Trusts. Equity. Fraud. Before Judge Brandam. Floyd County. At Chambers. January 4, 1883

Morris & Company and other creditors of Cohen Company filed their bill against the debtors, and M. A. Nevin and Z. Zacharias, as assignees of such debtors, an certain preferred creditors under the deed of assignment so made. The bill charged, in brief, as follows: The fir of Cohen & Company is insolvent and neither member thereof is solvent, allowing for exemptions, etc. The fire was composed of M. H. Cohen and Abram Zacharias. 0 December 4, 1882, they fraudulently executed a voluntary deed of assignment, by which they claimed to have tran ferred all of the firm property to the assignees named abov for the benefit of their creditors, certain preferences being given, and M. A. Nevin being the first preferred creditor Z. Zacharias is a brother of Abram Zacharias and a broth er-in-law of Cohen. Before the failure, he was nominal employed by the firm, but complainants believe that I was really a partner. By the terms of the deed of assign ment, the assignees were directed to sell and dispose the property, collect the debts and convert the assets in money. From the proceeds they were first to pay all the expenses, including attorneys' fees, due and to become du by Cohen & Company, or that might be incurred by Nevi and Zacharias in the execution of the trust. Certain cre itors were preferred, and their claims were to be settled a fast "as the money may be realized." Most of these cree itors are non-residents, and the validity of their claim is not admitted. The assignees are rapidly converting the assets into money in a wasteful and ruinous manne and at prices far below the actual value thereof, thus redering the prospect of paying unpreferred creditors ver The assignees have allowed the members of the insolvent firm to remain in the store and sell and receiv the proceeds of sale as before the assignment. Various Cohen & Company et al. rs. Morris & Company et al.

and fraudulent statements were alleged as made by obtors in regard to their solvency, the business which lid, the amount of stock, etc., on the faith of which ainants sold them goods shortly before the assign-

All of the property of the debtors was not included assignment, but they have made fraudulent resers, and the reservation of fees due and to become vas an illegal reservation for their benefit. e assignees able to respond to a legal judgment for ise of their trust, nor are they solvent, after deducte value of their homesteads. Two necklaces and lockets were shipped by one of complainants to dents for the purpose of making a selection therefrom, y desired to purchase. No selection was made, but operty was retained, and not included in the schedule. were other allegations not material here. ent attached to the bill shows a recognition of the of complainants. The prayer was that the assignbe declared void; that complainants have judgment eir claim; that a receiver be appointed, who should charge of the assets and reduce them to cash, and ne proceeds subject to the order of the chancellor; e defendants be enjoined from intermeddling with ets, and for subpæna. Discovery was waived.

I charges of fraud, fraudulent representations, reserof benefit by the debtors, waste or mismanagement
assignees, and the other substantial grounds of
alleged in the bill. Nevin alleged that he was not
nt, but that his solvency was immaterial if he faithlischarged his trust, which he proposed to do. Z.
has made similar allegations, and it was denied that
been a member of the firm, but alleged that he
dy been called in at times to assist them. It was
ed that Cohen and Abram Zacharias had remained
store to give information as to cost and value of
etc., with which they were familiar, but it was stated.

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that, in all cases, the money received by them from so had been paid over to the assignees. The preferred clawere asserted to exist bona fide, especially as to Newhose claim was alleged to be for money borrowed to in the business of the firm. The answers admitted claims of complainants. On the subject of attorneys' for the answer of Cohen & Company asserts that they men provided for the payment of the expenses of administing the trust out of the assets. In reference to the jewes the answer alleged that Cohen & Company had sold of the chains and returned the other before the assistment, and that this was done bona fide.

On the hearing, numerous affidavits were introduced both parties. It is only necessary to state that, from so of those on behalf of complainants, it appeared that a E. J. Zacharias stated that he had powers of attorney from all of the non-resident preferred creditors, authorized him to represent them in connection with the assignment and that this remark was made in the store of Cohen Company after the assignment, and while Zacharias was acting as a clerk or salesman, if with no higher authorized.

The chancellor removed Z. Zacharias, and ordered assets to be turned over to Nevin, as assignee, who show proceed to sell the property for cash and hold the processubject to the order of court. A bond of \$2,500.00 v required of him. (The claim of complainants amount to more than this, and the assets were several times much.) The other defendants were enjoined from integring with the property. Defendants excepted.

Underwood & Rowell, for plaintiffs in error.

FORSYTH & HOSKINSON; LINTON A. DEAN; JUNIUS HILL YER; HAMILTON YANCEY, for defendants.

JACKSON, Chief Justice.

This is a bill filed by certain creditors of Cohen & Co pany against them and Zacharias and Nevin, their assign Cohen & Company et al. vs. Morris & Company et al.

heir stock of goods, etc., praying that the assignees bined from proceeding with their trust, and that a r be appointed to take charge of it, etc.

the complainants are not judgment creditors, but re cestuis qui trust under the deed of assignment, the schedule of creditors their names appear, and ount of their respective debts. They are not precreditors, but interested in a just administration of ast, the collection of assets, and the appropriation s, so as to have their share, if anything remains after aftered creditors are paid. Equity has jurisdiction class of trusts as of all others. In Burrill on Assents, 3d ed., chapter forty-four, par. 491, it is said the assignee be remiss in collecting and rendering sets available, the proceeding is by bill in equity, he same principle is announced in 2 Story Eq. Jur.

ed it must be so from the plainest reasoning. rs, whether preferred or otherwise, if named in the assignment are cestuis qui trust, and the assignees ir trustees. Shall these trustees abuse their trust mpunity, mismanage and waste the only assets to the creditor can look for payment, and is there no y for those in whose behalf the assignment was Could not one of the preferred creditors call these s to account; and if so, why should not one who, not preferred, is interested in having all the assets ed and protected, that he may get a part of what s after the preferred creditors are paid? But it is to press argument on the point, as this court has ized the principle. 38 Ga., 167, 170, 171. l here that one of the assignees is a near relative of ignors, and has been clerk, if not partner; that both ling the goods at inadequate prices; that the asand debtors take part in the sales; and that the management is contrary to right and wasteful of sets entrusted to them for the benefit of complainCohen & Company & al. vs. Morris & Company & al.

ants; and particularly it is alleged that another Zachari the father of the discharged assignee, and of one of tassigners and the father-in-law of the other, is the attempt in fact of the non-resident preferred creditors, a receives and sends them, beyond jurisdiction of the couthe proceeds as fast as realized.

2. Have these complainants the right, thus being preciped in a court of equity, to the strong equitable interfence by injunction and receiver?

Upon principle, it would seem that they have.

trustee mismanages the property entrusted to him, and still persisting in the mismanagement of it, he ought to stopped in some way from such mismanagement. He is his course to be arrested otherwise than by a writ of junction restraining the wasteful and illegal conduct, by a change of the trustee by appointing a receiver, officer of the court, to take charge of the business and management.

age all under the supervision of chancery?

If the court of chancery may interpose at all with a management, it is quite certain that the court below excised the power as favorably to the debtors and their signees as could have been done. The order complained removes one of the assignees who is intimately connect with the partners and charged to be in full complic with them, and invests the other with the full control it, appointing him receiver, and requiring a small bond the sum of twenty-five hundred dollars from him. The assare much larger, the debts very heavy, the debtors insvent, the assignee removed equally so; and the order pears to us to be mild and discreet, oppressive to nobo certainly not to the debtors and the remaining assignappointed receiver. It can work no harm to any one

terested, and brings the whole management under the of the court under the deed of assignment, so that court may see that it is judiciously and honestly carrout by one of the trustees, who is merely converted in

a receiver and is, in fact, a trustee still.

Cohen & Company et al. 18. Morris & Company et al.

ore made receiver, he was subject as trustee to equitsupervision; now he becomes a quasi officer of the and is subject to closer scrutiny. That is practically e difference between the two characters he sustains cestuis qui trust, and this change became absolutely sary to do equity. Why retain the bill at all, if receeds of sale go beyond the jurisdiction of the If These creditors have the right to attack the bona of the debts of those preferred. What good will that the money be beyond the jurisdiction of the court, ney have it?

But this case, we think, rests upon another equity. eed of assignment is assailed in so far as it reserves, gh counsel fees, a benefit to the assignors, and because preferred creditors have no just claims; and though complainants are not judgment creditors, yet they cognized in the deed as creditors, and the amount of debts is also recognized therein. Their names apn the schedule, and the amount of the indebtedness e debtors to them. So that, the amount being wledged by the debtors, there is no necessity for a ent to fix that amount. As against partners, who are ent as a firm and individually, a general creditor brings a bill for himself and all who choose to join, eld in New York, may have the remedy by injuncand receiver, as against the partners, assignees, and persons, where the debt is undisputed, and the deed ailed as made to hinder and delay creditors. 10 How. ., 225, 461; 15 Ib., 395; 9 Ab. Pr. R., 127.

sides, in the case at bar, it is alleged and proved by vits that as late as November, 1882, goods were sold by complainants or some of them on representations of acy by this firm; that these representations were disas to the amount of indebtedness and the value of property, and were false, and fraudulently designed ocure the goods of these creditors without paying for; and the assignees are charged with complicity in

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this matter; and thus no title passed. These facts, if tr bring the case within the ruling in *Cohen vs. Meye* Cohen & Company, 42 Ga., 46, and subsequent cases.

Indeed, in respect to some of the goods delivered, jet elry, etc., it is alleged that the goods were not sold, delivered for inspection and selection by the assignors such as they would buy, and these goods are set out in bill appended; so that they can be identified, if a corraccount of sales and what is sold be kept by the receive We think that, under an assignment of everything, the partners possess; all their stock on hand, made on the of December, less than a month after the delivery of so of the goods of complainants; these specifications of character of goods sold are sufficient, as charged, to identify the assignors and assignees have managed the business properly and kept such books as they sho have kept.

It is true that in the case in 56 Ga., 144, this court h that, where goods were so sold, there was no lien; but in t case the title was not attacked, but the lien only insisted Here the title is attacked because of a purchase by fra which vitiated and annulled the title, as we understa the facts, and in some instances all semblance of sale explicitly denied, and it is declared and sworn to, that goods were merely delivered for inspection with a view future purchase. And though no rescission of the sale asked for in the first class of debts, that is, sale void for fra yet that is the necessary result of the bill, its allegations prayers for such relief as equity can administer; and in econd class, where no sale at all was made, but the goods s for inspection merely, with a view to future purchase course no title passed, and those goods are the prope of the complainants still, and the right to them, or the proceeds, if sold, would seem to be clearly in complainat and to account for them, if on hand, or those proceed sold by the assignees, this proceeding is more comp Cohen & Company et al. vs. Morris & Company et al.

perfect a remedy, under the facts brought out in the ence, than any remedy at law.

in 56 Ga., 427, there was no allegation or proof of of any sort in the complainants before the chancellor p. 429 of opinion); and thus in that case, while the on shows equity in the bill, p. 430, the injunction lenied.

erefore, we are led to the conclusion, after much deation, that this case comes within the spirit of the adations of this court in 42 *Ga.*, *supra*, and 57 *Ib.*, 247: 58 *Ib.*, 50.

e are aware that there are some adjudications in other s to the effect that creditors cannot attack an assignas fraudulent and void, and at the same time claim r it and call on the assignees to account to them; and aps, on the final hearing of this case, it may be necesto confine complainants to the one or the other of the spects of the bill and depositions, either to a square k on the deed of assignment, or to the equitable rights e creditors for a strict accounting under it. ion before us, however, the injunction and receiver the cautious and prudent order of the chancellor on,—the affirmance or reversal of that order alone, n is the sole question for adjudication now, it is unsary to enter upon this double aspect of the bill; and epress no opinion thereon. The chancellor, on that hearing, will doubtless give such direction to the ingation as the rights of the parties, when all the facts illy developed, shall require, according to the princiof equity and the practice in courts of chancery. further on the general subject, Burrell on Assign-

s, §§92, 93, 159, 165, 469; 3 Wis., 367; 30 Mo., 561; rk., 325; Perry on Trusts, §§817, 818; 9 N. Y. 176; on Rec., 406, 407, 408, 409, 459, 460; 11 Md., 370; ge. 298; 8 Ga., 511; 10 Ib., 273.

dgment affirmed.

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Howard vs. Simpkins & al.

#### HOWARD vs. SIMPKINS et al.

[After this case was argued, but before the decision was announced, Crawford died, and Blandford, J., was elected to succeed him.]

- The plea of the general issue having been filed at the first ter
  to a suit on two promissory notes, pleas that both notes w
  given for the same consideration, the last being given on the r
  resentation that the first was lost, failure of consideration, min
  ity and coverture, may be added by way of amendment.
- A promissory note payable to order, which stated that it was gir for a buggy and harness, "upon the distinct understanding the the title was not to pass" until paid for in full, was negotiable
- (a.) In the hands of a bona fide holder for value before due and we out notice, no defences could be set up to a suit thereon, excended for est factum, gambling or immoral and illegal consideration, fraud in its procurement.
- (b.) A promissory note given for a buggy and harness, being absolon its face, a reservation therein of title by the payee until payment was not sufficient to put an endorsee for value, befue, on notice of any defence by the maker.
- 3. The plea of infancy goes to the capacity to contract, and a be fide holder before due and without notice is not protected the from.
- (a.) A buggy not being an article of necessity to an infant, no receiver could be had against him on a note given therefor.
- (b.) Were it otherwise, could he be made to pay its value to any obut him with whom he contracted? Quære.
- (c.) That a minor is employed as a clerk, is not such a business would render him responsible for his contracts under section 2 of the Code. Were this not so, no connection is shown betwee the purchase of a buggy and the business of clerking.
- By the common law a married woman could not make a note all; nor could she ratify it during coverture, or afterwards, exc on a new consideration.
- (a.) In this state the wife is a *feme sole* as to her own property, a may contract, except to bind her separate estate by any control of suretyship, or to assume the debt of her husband, or to pay same by any sale of her separate estate to his creditor.
- (b.) While a married woman cannot legally become a security another's debt, yet where she has signed a negotiable note w another, as a joint maker, for the purpose of securing the debt the latter, and it has been transferred to a bona fide purcha for value before due and without notice, it is valid, and binds h

August 27, 1883.

Howard rs. Simpkins et al.

mendment. Pleading. Promissory Notes. Contracts. ants. Married Women. Notice. Before Judge Eve. y Court of Richmond County. January Term, 1883.

Reported in the decision.

F. H. MILLER, for plaintiff in error.

F. W. CAPERS, Jr.; HARPER & BROTHER, for defendants.

ekson, Chief Justice.

The plaintiff brought suit on the two following notes:

50.00

AUGUSTA, GA., August 6th, 1881.

On the first of November, we promise to pay to C. Toler, or order, hundred and fifty dollars, at either bank in the city of Augusta, for one end-spring top buggy and harness this day delivered to upon the distinct understanding that the title was not to pass to until paid for in full, and he is authorized to take possession of me at any time until fully paid.

H. M. Simpkins,

M. L. SIMPKINS."

Indorsed, "C. Toler."

150.00 Augusta, Ga., August 25, 1881.

Sixty days after date, I promise to pay C. Toler, or order, one hundand fifty dollars, at either bank in the city of Augusta, Ga., for end-spring top buggy, harness, whip and mat, this day delivered me, upon the distinct understanding that the title was not to pass me until paid for in full, and he is authorized to take possession of me at any time until fully paid for.

H. M. SIMPKINS, M. L. SIMPKINS."

dorsed, "C. TOLER."

Plaintiff was endorsee for value before the maturity of e notes, holding them as collateral for a debt due him by e payee. The defence is that the notes are not negotible so as to shut out the equities between the original rties in favor of a holder for value before due; that both tes were given for the same consideration, the last in acc of the first, on the representation of the payee that had lost the first; that the consideration had failed, in

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that the payee had taken back the buggy, under the terms of the contract on the face of the notes; that one of the defendants is a minor and the other surety only, and a maried woman, and neither, therefore, liable to pay the deb-

- 1. These defences were set up by pleas at the trial term the general issue having been filed at the first term, an plaintiff objected to them for that reason as being too late. They were in time, as amendments to the plea of the general issue.
- 2. The notes are negotiable. It was so held when the case was here before,\* and our statute is very plain on th The Code, section 2776, declares that any "con tract in writing for the payment of money or any articl of property, \* \* is negotiable by indorsement or writte assignment, in the same manner as bills of exchange an promissory notes." These notes were made payable t the order of Toler, and when indorsed by him to Howard the plaintiff, the title passed to him, and they stand as an other promissory notes would in his hands as holder for value before due. The only defences which could be se up to them, then, are prescribed in our Code. Section 2785 declares that "the bona fide holder for value or a bil draft, or promissory note, or other negotiable instrumen who receives the same before it is due, and without notice of any defect or defence, shall be protected from any d fences set up by the maker, acceptor or indorser, exceptor the following: 1. Non est factum; 2. Gambling, or in moral and illegal consideration; 3. Fraud in its procur ment."

Is there notice here to affect this holder? None is presented, except what appears on the face of the instrument. That only affects a reservation of title to the buggy untithe note is paid. It reserves a right to the payee; not to the makers. They bind themselves to pay the money maturity, in any event. He reserves the title to the bug as a security until all that becomes due is paid. Such

<sup>\*69</sup> Ga, 778. (Rep.)

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ervation puts no purchaser of the negotiable instrument notice of any sort of defence to it, for none is hinted at the paper. 2 Kelly, 92; 3 Ib., 47; 22 Ga., 246; 25, 225; 61 Ib., 208.

B. But is not the plea of infancy good? The bona fide der is not protected against that plea. It is incapacity contract. 1 Parsons on Bills and Notes, p. 276; also 67 n. F., and cases cited. Code, 2729. This rule of mmon law and of the Code, has not been varied by tute, or by any change of the law as to infants, by any eision of this court.

The consideration of the note is a buggy; not an article necessity to an infant. Therefore, he is not bound to y even the value of the note, under section 2731 of the de, even if he could be made to pay it at all to any one thim with whom he contracted for the necessaries. 10 hnson, 33; 10 Metcalf, 387.

Nor is he liable under section 2733 of the Code, which acts: "If an infant, by permission of his parent or guaran, or by permission of law, practices any profession or de, or engages in any business as an adult, he shall be und for all contracts connected with such profession, de or business." He was a mere clerk; therefore, he s practicing no trade or profession, and hardly carrying any business as an adult, in the sense of the statute. at sense is an engagement in business for himself; not e mere fact that he is hired to clerk for others. But en if clerking were a business of his own, in the sense this section of the Code, we do not see the connection tween a buggy and the business of clerking; and the tute makes him liable for "contracts connected with ch profession, trade or business." No proof is in the cord that he used the buggy, or bought the buggy to use. the business of clerking.

For these reasons, we think it clear that the judgment of e court below is right so far as respects the infant.

4. Is it right in sustaining the plea of the mother that

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she signed the note as surety for her son, and being a married woman, it is void as to her.

By the common law, she could not make the note at all 1 Parsons on Bills and Notes, p. 276; also p. 79, and cases cited. And because of her incapacity to make it, she would stand exactly like the infant; nay, in better condition to defend, because she could not ratify at all during the coverture, or after its termination, except on a new consideration. 2 B. & Ad., 811; 8 A. & E. 467; S. Sand., 311; 6 Ala., 737. In this state, even before the act of 1866 and subsequent constitutional and legislative enactments, tending to make her a feme sole, she could bind her unincumbered separate estate by promissor, note. 32 Ga., 604, 606; 39 Ib., 41.

But the law in regard to a married woman, and all he rights and disabilities, has undergone a complete revolution in this state since the act of 1866, which, in fact are as to all her property, makes her a *feme sole*, almost it every respect as if she never had been married, so far a property is concerned. Code, 1754. And this enactment is now part of the constitution. Code 5087. "All property of the wife at the time of the marriage, and all property given to, inherited or acquired by her, shall remain her separate property and not be liable for the debts of her husband," is now the sweeping provision of our fundamental law.

Still, by virtue of section 1783 of the Code, it is insisted by defendant in error that she cannot become surety for anybody. That section is: "The wife is a feme sole, unless controlled by the settlement. Every restriction upon he power in it must be complied with; but while the wife may contract, she cannot bind her separate estate by any contract of suretyship, nor by any assumption of the debt of her husband, and any sale of her separate estate, made to a creditor of her husband, in extinguishment of his debts, shall be absolutely void."

Under this section, construed in connection with the ac

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866 and the constitution, in pari materia, it has been I by this court that she cannot become a surety now, ause the effect of the act of 1866, and of the constitutal provision, is simply to make all her acquisitions of perty her separate estate, and they all stand on the se footing as a separate estate, settled without restrictions her powers in the face of the settlement; and by the le, section 1783, even when a settlement was unrected, she could not become surety at all.

'he question then recurs, how is a bona fide holder cted by her plea that she signed the note as surety? Is nullity as to him, or can he collect it from her out of own property? In the case of Perkins vs. Rowland, ided at the September term, 1882,\* this court held that, hile a wife cannot legally assume a debt of her husd, yet where she has given a negotiable note for his t, and it has been transferred to a bona fide purchaser value before due, and without notice, it is valid and ds her. Therefore, when suit was brought by a third ty, to whom such a note had been transferred, to forese a mortgage given to secure it, a plea to the effect that note was given by the wife for the debt of her husband, which did not allege that the plaintiff had received the e after maturity, or with notice, was fatally defective." The principle there decided, we think, covers the point v under consideration here. By the Code, section 1783, contract of the wife to pay the debt of the husband. the sale of her property to that end, is as illegal and d as is any contract of suretyship made by her. n, a negotiable note, given by her to pay the debt of husband, be good in the hands of a bona fide holder, y is not a negotiable note, given by her to secure the ot of her son, equally good in the hands of an innocent der? We fail to see any distinction between the two es. By the common law, let it be borne in mind, a rried woman could not make a negotiable note. By the

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laws of Georgia now, she may make such a paper, but no to pay her husband's debt, or as surety for another. Inas much as she may make it and put it in circulation withou regard to her coverture under the laws of this state, whe she does so put it in circulation and makes it negotiable payable at any bank in Augusta, to the order of the payer who indorses it to the plaintiff, before due, the plainti taking it for value, as collateral security for money loaned is legally entitled to recover the amount of the notes from her estate, if she has any which can be reached by a com mon law judgment. She put in circulation a bankable negotiable paper, not as surety, but as joint maker, and between loss by herself and an innocent holder of this pa per, justice, as well as law, would put the loss occasioned by the default or rascality of the payee on her, rather than on him.

To show how far this court, in its construction of the woman's law of 1866, has untied her hands and freed her from the conjugal merger in the husband, see 44 Ga. 541-3; 48 Ib., 554, 561; 39 Ib., 41; 51 Ib., 147; 55 Ib. 406-9; 56 Ib., 344; 61 Ib., 512; 62 Ib., 733; 65 Ib., 571 Judgment reversed.

# EDWARDS et al. vs. KILPATRICK, administrator, et al.

- Bills in equity, except in cases of injunctions to stay pending proceedings, must be filed in the county of the residence of one of the defendants, against whom a substantial relief is prayed.
- (a.) In cases of collusion between one holding land which equitably belongs to an estate and the administrator, on account of which the latter refuses to sue, heirs and creditors may sue in their own names; but this right of action exists in the same manner and to the same extent only as it does in the administrator. The refusal of the administrator will not suffice to change the venue.
- 2. Where one, for the purpose of defrauding creditors, entered into an agreement with another to have his property transferred to such other person, with an agreement that the latter should reconvey to him after litigation should have terminated and the amount paid

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nould be refunded, equity will not aid such debtor to recover the roperty; nor have his heirs any higher right, after his death, than e would have had in his lifetime.

pril 24, 1883.

Equity. Jurisdiction. Administrators and Executors. le. Fraud. Before Judge LAWSON. Jones Superior art. October Term, 1882.

Reported in the decision.

R. V. HARDEMAN; LANTER & ANDERSON, for plaintiffs

A. D. HAMMOND; BILLUPS & HARDEMAN; L. E. BLECK-, for defendants.

AWFORD, Justice.

This bill is filed by Annie M. Edwards, for herself and the next friend of her minor child, Annie M. Johnson, ainst Wm. G. Kilpatrick as administrator of Wm. Johnson, deceased, of the county of Jones, and Wm. H. Head, the county of Monroe. The complainant, Annie M. wards, was the wife, and Annie M. Johnson the child, the deceased intestate. This bill is filed to recover cern lands which formerly belonged to the said Wm. Johnson, and which were sold under an execution against him 1873, and bought by the defendant, Wm. H. Head.

The allegations in the bill which are necessary to coner in ruling the case are, substantially, that about the ne of the sale of this land, there was pending in the perior court of Jones county a rule to foreclose a mortge upon it, which the said Johnson, the mortgagor, was disting. In view of this proceeding to foreclose the presaid mortgage, and of the fact that the said Johnson as embarrassed, and unable to raise the necessary funds settle the fi. fa. which had been levied upon the land, d reposing special trust and confidence in the said Wm. Edwards et al. vs. Kilj atrick, administrator, et al.

H. Head, who was his son-in-law, it was agreed between them that the land should be sold at sheriff's sale, and that the defendant, Head, should buy it in, and take title thereto to himself, in order to defeat a recovery upon the mortgage then being foreclosed against the said land And it was further agreed between them, that pending the said litigation and afterwards, the said Head was to have and receive the rents, issues and profits arising from the said land, until he should be reimbursed all amounts paid out by reason of the said sale, as well as whatsoever h might thereafter have to pay out, on account of any recov ery had by the foreclosure of the mortgage or otherwise That after receiving an amount from the said lands suff cient to repay all the advances, with legal interest thereon then the said Head was to reconvey the said lands to th said Johnson. That he has received from the said land largely more than sufficient to pay all the advances mad by him for the said Johnson. That the said Johnson die in 1875, and the said Head has refused to account for the same, and has taken charge of the said lands as against th administrator and the rights of the complainant as t dower, or any other interest she might have, or that the daughter of the said Wm. Johnson might be entitled to i the said land; not only refusing to reconvey, but asserting title in himself, although he has paid out but a fractions part of the value thereof. That he refuses to turn over the said land to the administrator, that it may be admin istered as the property of the said Johnson, which is fraud, both upon the estate of the said Johnson and th complainants. The prayer of the said complainants i that the said defendant, Head, be compelled to accour for all the rents, issues and profits arising out of the sai land, and to answer as to the amount paid out in and about the several matters to which reference has been made that the sheriff's deed be delivered up for cancellation, an the land revert and be vested in the estate of Johnson for administration; that Kilpatrick, the administrator, b Edwards et al. vs. Kilpatrick, administrator, et al.

ized and required to administer the same, allowing implainant her dower or child's part, and the balance idministered for the benefit of the heirs and creditors. The were amendments offered and allowed to the said at nothing material or necessary to be stated, in the retake of the case, except that discovery was waived general charge of collusion between the administrator, Kilpatrick, to sue.

his bill the defendant, Head, filed a demurrer upon ounds:

That there was no equity in the bill.

Because there was no substantial relief prayed t Wm. G. Kilpatrick, the administrator.

That Head resides in the county of Monroe, state orgia, and complainant has no right to maintain her rainst him in the county of Jones.

Because there is no adequate and sufficient considn to support the contract or agreement set forth in ll, and the same is illegal and without equity to supt.

er argument had on the demurrer, it was sustained court, and the bill dismissed. This judgment we to be correct, if not under the first, certainly upon cond, third and fourth grounds of the demurrer, hich may be considered under two heads.

the first, the want of jurisdiction over the defendant, and the second, the illegality of the contract relied by the complainant for a decree in her favor. That is, except in cases of injunctions to stay pending dings, must be filed in the county of the residence of the defendants, against whom a substantial relief red, is declared both by the constitution and the law. In this case discloses no such initial relief prayed against Kilpatrick, the administration of the bill in this case of venue as to his co-defendant in the bill. 34 Ga., 523.

Edwards et al. ve. Kilpatrick, administrator, et al.

It is shown that the title to the land in question was Head two years before the death of the intestate, and the he was in the possession thereof, exercising all the acts ownership over it.

But it is alleged that the estate of the said Wm. Joh son has the equitable right to the same, and that there collusion between the administrator of Johnson and t defendant, Head, and that application has been made him to sue, and that he has refused to institute proceedings for the recovery of this property. Upon such allegation, it has been held by this court that the heirs a creditors are authorized to commence proceedings in the own names for that purpose. Whilst this right exists, must, of course, exist in the same manner, and to the same extent only that it does in the administrator. If, then, had brought suit against Head, his co-defendant, it must have been brought in the county of his residence, and the only.

The allegation in complainants' bill of the refusal of t administrator to sue is sufficient to authorize the suit to brought by them, but not such as to authorize it to ha been brought by them in the county of Jones.

2. We think that the allegation made in complainant bill, touching the contract between the defendant, Her and the intestate, is such a one as cannot be invoked aid of any right which might have existed under it. The complainants can have no higher equity in this land the the deceased had, and if he were the complainant, hardly think that it would be seriously contended that could be heard to maintain such a cause in a court equity.

It is clearly and distinctly alleged by the complainant that the contract between the deceased intestate and the defendant, Head, was made to defeat a recovery upon the mortgage then being foreclosed against the said intestal and on the very land sued for in this bill. This, then, ing a part of the mala fides complained of against the said intestal and on the very land sued for in this bill.

Mosely et al. vs. Carr et al., administrators.

dant, and the foundation of the complainants' equity, is the case within the ruling of Peacock vs. Terry, 9 137. It was there held, that "A complainant who cipates with the defendant in an act by the defendant in is in violation of the laws of the land, is not entito relief in a court of equity against the consequences chact." And also within the decision of Crosby vs. Defenreid, 19 Ga., 290, in which the court said: "A., to ud his creditors, transfers his property to B. and dies. dministrator files a bill against B. to get possession of roperty, that he may, with it, pay the creditors: Held, there is no equity in the bill."

as complainants allege, this contract was made to it a recovery upon the mortgage, by the intestate and efendant, Head, neither he in his lifetime, nor his , executors or administrators after his death, can be l in a court of equity to set it aside.

e think that the judge committed no error, therefore, staining the demurrer.

dgment affirmed.

Mosely et al. vs. CARR et al., administrators.

cablish a lost will, the law requires that a copy of the same, arly proved to be such by the subscribing witnesses and other dence, shall be produced, before it is admitted to probate and ord in lieu of the original. The probate can only be made as bates are made in solemn form. Where one of the witnesses uses to testify to the execution of the will, or denies the same, ourt of equity will not enjoin the administration of the estate in er to give the propounder an opportunity to test the memory the perjury of such witness.

reh 27, 1883.

ills. Witness. Equity. Injunction. Before Judgeons. Bibb County. At Chambers. January 9, 1883.

Mosely & al. vs. Carr & al., administrators.

The following extract from the decision of Judge Si mons sufficiently reports the case: "The bill alleges the one W. A. Evans died, leaving a will, by which he gave the complainants all of his property; that the w has been lost or destroyed; that he is seeking establish a copy of the will in the court or ordinary; the two of the witnesses have made affidavits of the executi of the will, and that the third witness, one Summerlin, h promised to make an affidavit, but had been deterred from so doing by respondents, and had now refused to ma said affidavit, but had made one that he had not witness the execution of any such will as alleged by complainan The bill further alleges that Carr and Evans had taken letters of administration upon said estate, and had sold personal property, and had advertised the realty, a would divide the proceeds among the heirs at law, w were insolvent; and that the administrators were ins The bill prays for an injunction to restrain said ministrators from selling said property and dividing proceeds until a hearing could be had upon the app cation to establish the lost will. The respondents filed demurrer to the bill, and also answered, denying all material allegations therein."

The chancellor dissolved the restraining order, of charged the temporary receiver who had been appoint and refused the injunction. Complainants excepted.

SAM H. JEMISON, for plaintiff in error.

G. T. & C. L. BARTLETT, for defendants.

CRAWFORD, Justice.

The single question presented by the record in this c is whether, under a proper construction of section 2431 the Code, the devisee or executor of a will alleged to be been lost, is bound to produce, and prove by all the s scribing witnesses thereto, if to be had, the existence such will, before a copy can be established.

Mosely et al. vs. Carr et al., administrators.

at section is in the following words: "If a will be lost estroyed subsequent to the death, or without the conof the testator, a copy of the same, clearly proved to ach by the subscribing witnesses and other evidence, be admitted to probate and record, in lieu of the nal; but in every such case the presumption is of cation by the testator, and that presumption must be tted by proof."

ne probate of a will, in common form, only requires the mony of a single subscribing witness, and is without the to any one. Probate, in solemn form, is with not and by all the witnesses in existence and within the diction of the court, or by proof of their signatures that of the testator, if the witnesses be dead.

establish a lost will, the law requires that a copy of same, clearly proved to be such by the subscribing esses and other evidence, shall be produced, before it lmitted to probate and record in lieu of the original. he subscribing witnesses are all to be produced, as in provided, then it follows that the probate can only nade as it is made in solemn form, and no will can be red in solemn form with less than the whole number of esses, if they are to be had. We hardly think that it ld be seriously claimed that a court of equity should rfere with the action of the court of ordinary in its adistration of the estate of a decedent, upon the ground a devisee was attempting to procure aliunde evidence robate a will in solemn form, because one of the subbing witnesses thereto would not swear to its existence xecution.

and if this could not be done, with how much less reashould such a proposition be entertained in the matter he effort to establish a will alleged to have been lost. complainant, by his bill, admits that he can produce two witnesses who will swear to the existence and execon of the will, and on the argument, insists upon the ortunity to test the memory or the perjury of the third ness thereto. Our reply to this application is, that the

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positive language of the law requires the production of copy of the will, and that it shall be clearly proved to be such by the subscribing witnesses and other evidence. It in the power of a court to override a positive statut and hold that such proof may be made by two of the three subscribing witnesses? If so, we could as well hold that or would be sufficient; and if neither of those who were a leged to have been the witnesses would testify therefore then enjoin the administrator until the same questions memory or perjury should be tried and passed upon by jury, as to all.

But the question has been ruled by this court in the case of *Kitchens vs. Kitchens*, 39 Ga., 168, in which it wheld, that "the execution of the will must be proved by three subscribing witnesses, if in life and within the jurt diction of the court, as in case of probate of a will in solen form." This ruling we approve, and seeing no reason relax the construction then placed upon the section, it hereby affirmed.

Judgment affirmed.

#### WORTHAM DR. THE STATE OF GEORGIA.

To reduce a killing from murder to voluntary manslaughter, the must be some actual assault upon the person killing, or an attent by the person killed to commit a serious personal injury upon person killing. Provocation by words, threats, menaces or a temptuous gestures in no case will free the person killing from guilt and crime of murder.

Upon proof of the killing, the presumption of law is that the criwas murder, and it will be so held, unless reduced by proof to lower grade of criminal homicide, or shown to be justifiable.

3. To have made this a case of justifiable homicide, the accused bound to show that the deceased manifestly intended or ender ored to commit a felony upon him. A bare fear will not justify killing. It must appear that the circumstances were such a excite the fears of a reasonable man, and also that he acted un those fears, and not in a spirit of revenge.

 The verdict was quite as light as could have been asked, under testimony.

April 8, 1898.

Wortham vs. The Sta e.

Criminal Law. New Trial. Before Judge HARRIS. riwether Superior Court. August Term, 1882.

Reported in the decision.

P. F. SMITH, for plaintiff in error.

H. M. Reid, solicitor general, for the state.

AWFORD, Justice.

The plaintiff in error was charged with the crime of rder; found guilty of voluntary manslaughter; moved a new trial, which was overruled, and he excepted. The grounds of the motion are that the verdict is con-

ry to evidence; strongly and decidedly against the ght of evidence; contrary to law and the principles of tice, and because there is no evidence to authorize a dict for voluntary manslaughter.

The defence of the plaintiff in error in the court below, sed upon the ground that the killing was not murder, justifiable homicide. In this court he relies upon the ne ground, as also upon the ground that the verdict for untary manslaughter cannot be sustained under any w of the evidence, and therefore, should be set aside, a testimony in the record shows that all the parties conted with this homicide were colored people; that the eased and the accused were the constant and regular tors of one Maria Dunlap, about whom it is evident difficulty occurred.

The state, by its witnesses, showed previous threats in the part of the accused to take the life of the eased; that they met on the night of the kill-while the accused and Maria Dunlap were walking ether; that the deceased asked the accused whether he are to insult him by what he had said to him that night, which he replied, "not unless you are of a mind to take or an insult," when deceased responded that he did not at any fuss, but wanted peace; the accused replied that

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he meant business; that the girl then ran off, saying the if they were going to have a fuss, she would leave then and the pistol fired directly thereafter, the deceased enclaiming, "you have shot me wrongfully," and soon after wards died, having been shot through the head. It was further shown by the state that the deceased had a stic in his hands, upon which he was leaning back during the conversation between the parties.

The accused, by his witnesses, showed about the sam facts, except that Maria Dunlap testified that, when sh ran off, the deceased had his stick drawn upon the accused and by another witness that some half hour after the kill ing, he found a stick about the size of his wrist, some tw feet away from where he found and removed the body The accused, in his statement, denied the threats, and th words said to have been spoken by him, that he mean He admitted the killing, but said that the de ceased had first hit him with a stick, which he threw up his hand to catch, but did not, and it struck him, and made a scar which was still upon him, that he struck him second time, and when he drew his stick the third time to strike, he shot him. Testimony was given to show that the stick said to have been in the hands of the deceased was a weapon likely to produce death.

These were substantially the facts testified to, and stated by the prisoner to the jury, and upon which they made up their verdict of voluntary manslaughter.

To reduce a killing from murder to voluntary man slaughter, there must be some actual assault upon the per son killing, or an attempt by the person killed to commi a serious personal injury on the person killing. Provocation by words, threats, menaces, or contemptuous gestures in no case, will free the person killing from the guilt and crime of murder.

Upon the proof of the killing, the presumption of the law is that the crime was murder, and it will be so held, un less reduced, by proof, to a lower grade of criminal homi Wortham vw. The State.

or shown to be justifiable. Taking the testimony of e witnesses, and the accused would be guilty of mur-No one testified to an actual assault upon him, or tempt by the deceased to commit a serious personal y upon him. The nearest approach to either was by vitness, Maria Dunlap, who swore that, when she ran the deceased had his stick drawn upon the accused, this, at most, was but a menace, and would not justify ling. But the jury, evidently giving him the benefit of loubt, concluded to accept his statement as true in and reduced the offence to voluntary manslaughter. have made it a case of justifiable homicide, the ac-I was bound to show that the deceased manifestly ined or endeavored to commit a felony upon him. fear that he was going to do so, is not sufficient to justify cilling. It must appear that the circumstances were as to excite the fears of a reasonable man; and it also further appear that he acted under those fears, not in a spirit of revenge.

king the testimony in this case, and with it the state. t, it would be hard to believe that the accused was y afraid that a felony was intended, or that the deed was endeavoring to commit one upon him. if this were so, then, under the other facts which shown, that he acted from his fears, and not in a spirit venge. Both are necessary to justify the taking of an life, and the courts and juries should impress it those who, for reasons not authorized by law, seize bloody knife or deadly pistol, and slay an enemy or a ; not that they fear the commission of a felony upon a, but in a spirit of revenge. Verily, it may almost be that human life is cheaper and less sacred than any r thing of value. Nothing but a stern administration ne law will increase its value or give it protection. Let done.

idgment affirmed.

Harrington vs. The Workingmen's Benevolent Association.

# HARRINGTON vs. THE WORKINGMEN'S BENEVOLENT ASSECTION.

The by-laws of a benevolent association provided that a membe good standing should be entitled to six dollars per week during period of his sickness, not exceeding eight weeks; that no classhould be considered before eight days from the date of said siness, and no benefits should be paid outside of Savannah; to sickness from drunkenness or debauchery should not entitle member to any benefits, "and no claim for benefit will be received acted on, except through the sick committee and furnishing doctor's certificate;" that twelve members should be appoint

annually by the president as a grievance committee, with power try all complaints brought to their notice, from whose decise there should be no appeal:

\*Held\*, that such by-laws were not contrary to law, and a member of the statement of the st

could only avail himself of the rights to be enjoyed in the way a

manner provided by such rules. A prerequisite to receivi benefits was the furnishing of a doctor's certificate to the sick co mittee; and the mere exhibition of such a certificate to a member of that committee was insufficient.

(a.) Whether or not a member of the association, by his obligation as such, waived his right to appeal to the courts for the collection of the dues claimed, it is not necessary to decide.

April 24, 1983.

Corporations. Actions. Contracts. Before Judg Tompkins. Chatham Superior Court. June Term, 1883

Reported in the decision.

A. P. Adams; S. B. Adams, by brief, for plaintiff i

R. R. RICHARDS, for defendant.

CRAWFORD, Justice.

This suit was brought by the plaintiff in error again the Workingmen's Benevolent Association at Savannah, is a justice's court, for the recovery of the sum of \$36.00 which he claimed to be due him for six weeks' sick benefit under the rules and regulations of the said association.

Harrington vs. The Workingmen's Benevolent Association.

The justice of the peace gave judgment for the defendt; the plaintiff carried the case to the superior court certiorari, where, on the hearing, the judgment of the stice was sustained, and the certiorari dismissed. This define to f dismissal is the error complained of. The testion made for adjudication by this suit is, whether or t the plaintiff is entitled to recover the sum sued for, ader sections 6 and 7 of article 1 of the by-laws of the id association, which are as follows:

"Sec. 6. Any member, in good standing, according to e constitution and by-laws, shall be entitled to the sum six dollars per week during the period of his sickness, ovided said sickness does not exceed eight weeks; and claim for benefit shall be considered before eight days om the date of said sickness; and no benefits paid to any ember outside of the port of Savannah.

"SEC. 7. Any member applying for sick benefit, whose kness has been caused by drunkenness or debauchery, all not be entitled to the same; and no claim for benefit ll be received or acted on except through the sick comttee, and furnishing a doctor's certificate."

These sections show exactly what is necessary to entitle number to the payment of his sick dues. Their requirements are just and reasonable, violating no law either oral or statutory, and being adopted and agreed to by members, must be complied with, to secure the benefits sing from the connection with this association. By ese it has been seen that no claim for benefit is to be seived, or acted on except through the sick committee, d upon furnishing a doctor's certificate.

In the present case, this was not done, as required; the tiative must be taken by the sick member, if he desires a weekly benefits; he must furnish a doctor's certificate the sick committee; and through that committee alone, tified with this certificate, can he reach the treasury of association. It is doubtless the security it demands protect itself against unauthorized payments to un-

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worthy members; but the purpose is immaterial; so lo as it is the law of their corporation it must be compl with, before any payment can be claimed.

If, however, the sick committee were in error, as is urg

and did him a wrong, there was a further provision for a protection of members against such wrong. By sect 20 of the by-laws of the association it is provided: "The shall be appointed by the president, at the annual meetitwelve members, as a grievance committee, who shall hapower to try all complaints brought to their notice; a there shall be no appeal against their decision."

Among the objects of the organization of this benev lent association, it is evident that the mutual aid to rendered to the members thereof by the observance of se imposed duties and obligations was among the most i It was to be a brotherhood of workingme governed, managed and controlled by its own membersh under its own laws, without extrinsic compulsion. operations for the execution of its benevolent designs we to be internal, and by persons of its own appointment provision was made to accomplish all the ends in vie there was nothing in any of its laws prohibited by statu or constitution; hence, whosoever became a member, cou only avail himself of the rights to be enjoyed in that w and manner provided by its own rules. The idea, the fore, of appealing to the state courts, appears to be inco sistent with all the ends aimed at, as well as all the ob gations assumed. At all events, we hold that, under t by-laws above set forth, before the plaintiff below wor be entitled to recover the amount claimed as sick dues, must exhaust all the remedies given him by the association This was a part of the contract under which he was received

as a member, and to which he agreed, that he might come a member. That he had a doctor's certificate, a that he may have shown it to a member of the sick comittee, was not sufficient; it was to be furnished to the committee,—whether for the evidence necessary for the

n, or as a voucher, is immaterial; that was the law had this been done in strict accordance with the rule, payment had been refused, then such refusal would been a grievance, of which he would have had just to of complaint, and to the grievance committee, he should have submitted that complaint, that it might been corrected. But failing in these requirements bringing his suit in the courts is, to say the least of it, nature.

hether or not he has, by his obligations as a member is association, waived his right to appeal to the courts ne collection of the dues claimed, it is not necessary to decide.

dgment affirmed.

## Peters et al. vs. West, guardian, et al.

ere was no error in refusing to continue this case, on the facts closed in the record; they showed gross laches on the part of endant in failing to obtain the evidence of a witness whose above furnished the ground of the motion.

will proved in common form and admitted to record is admisle in evidence; and if unattacked for seven years, is conclusive on all the parties in interest except minor heirs at law.

an action of ejectment by legatees under a will, proof that the estor died seized and possessed of the premises in dispute, that y were afterward assigned as dower to the widow, who went p possession, and who is now dead, makes out a prima facie e; and the proceedings to obtain dower will not be rejected mevidence on account of irregularities, the widow having occud the land as her dower, and irregularities, if any, being thus ed.

e mere fact that an amendment to a declaration is made, will work a continuance, in the absence of any statement from the posite party that he is surprised or is less prepared to try the

e declaration in ejectment described the land sued for as "being the 9th district of originally Fayette, now Campbell county." e evidence showed that the land was actually in the 13th land trict of Campbell county, but there was evidence to show that

it was located in the militia district which was known as the "ol 9th" of Fayette county.

Held, that there was no error in admitting this evidence, nor in r

- fusing a non-suit on this ground, nor in charging that as the d claration located the land only in the "9th district," if the jubelieved that the land sued for was the same as that described the declaration, and lay in what was called the 9th district originally Fayette county, even though it be the 9th militiad trict, then the plaintiffs could recover, if they had title there The question was one of fact for the jury, whether the proof of ered the lot sued for.
- 6. There was no error in ruling out testimony to show the value clearing the land by defendant in ejectment as a set-off again mesne profits. The clearing was in the time of the life tenant a the holding under her. The present suit was brought by the maindermen.
- Objections to the admission of testimony must state the groun thereof.
- The verdict is sustained by the evidence.
   April 3, 1888.

Continuance. Evidence. Wills. Title. Ejectmen Estates. Mesne Profits. Set-off. Before Judge HARR Campbell Superior Court. August Term, 1882.

West et al. brought complaint for land against Georand Hosea Peters. The declaration alleged that plainticlaimed as children of Charles J. West, under the will their grandfather, Allen West (the minors being repsented by a guardian). The land was described as being fifty acres off of the southeast corner of lot of land number 192, and seventeen and one-half acres off the nor east corner of lot of land number 193, containing in a sixty-seven and one-half acres, more or less, situate, lying and being in the 9th district of originally Fayette, and being in the 9th district of originally Fayette, and Peters filed a disclaimer of title, and the case proceed against George Peters alone.

On the trial, the evidence showed, in brief, as follow Allen West owned and died in possession of the land He left a will by which he devised it to his wife for his

of testator's son, Charles J. West. After his death, West applied for and obtained dower in the land, and bied it as such. She sold it to George Peters, who possession of it. She died in 1878, and since her a this suit has been brought. The land spoken of was located in land lots 192 and 193. It was not be 9th land district of Campbell county, but in the land district. It was, however, located in a militia first which was called "the old 9th" of Fayette, that has been the number of the militia district. There some other conflicting evidence on the subject of the profits, etc., not material here.

- fendant moved for a non-suit because of a variance een the description in the declaration and in the testir. The motion was overruled.
- e jury found for the plaintiffs the premises and 00 as mesne profits. Defendant moved for a new on the following among other grounds:
- ) Because the court refused to grant a continuance, notion of defendant, because of the absence of Hosea rs. [The showing was as follows:
- efendant stated that Hosea Peters lived in the county, been subpænaed, was not absent by his leave or proment; that he expected to get his evidence at the next of the court; that the showing was not made for delay. he expected to show by Hosea Peters that the land poor, without fences to protect it against the stock; it was washed into gullies, some of it rocky: that it not, in its condition, worth anything for rent; that and was planted in cotton in 1879, and made nothing of expenses; that the tenants on the land were run hat they were shot at; that some parties went to the e, and shot at and into the house, and ran the tenants hat one of the tenants was found dead on the place, and and could not be rented at that time; the fences did

protect the land; the stock broke in, and nothing could

be made; that in 1880 oats were sown, and the stock ate the up. That Hosea Peters is sick and unable to attend court; is afflicted; was shot during the war of 1861 through the lungs and chest, and he suffers a great deal at times; I has spells, sometimes as far apart as three weeks, general oftener; he was well and in town last week. That witne was not at the last term of the court; was sick then, an the case was continued on account of his absence; that h had come to the three previous terms of the court, and that defendant was absent then, and the case continued on a count of the sickness of defendant. That defendant ha been sick for seven or eight years; that he has been blind his health is better now. Hosea Peters had been we enough to go to court a week before court came on, an for some little time before.

Thomas W. Latham, Esq., stated that Hosea Peters, week before court, was at his office and was in his usus good health, and that there was no necessity for taking in terrogatories.

Peters swore that he had no other witness to those points and that he could not safely go to trial without Hosea Peter

- (2.) Because the court admitted in evidence the will a Allen West, defendant's counsel objecting thereto, on the ground that one of the attesting witnesses had signed he name with a mark, and had never sworn to his mark, but the probate had been made and the will recorded on the proof of the other two.
- (3.) Because the court admitted in evidence the dowe proceedings on behalf of Mrs. West.—The objection was that the order appointing commissioners was not signe by the judge, and that one commissioner who acted was Aaron Godwin, while the commissioner named in the order was Edwin Godwin.
- (4.) Because the court refused a continuance, after plain tiffs had amended their declaration so as to change the name of one of them from Minnie West to Winnie West

- ) Because the court refused a non-suit, as stated e.
- ) Because the court allowed testimony to show that and was located in what was known as the old 9th ia district.
- Because the court charged as follows: "It is insisted effendant that the proof must show that the land lies in the land district of originally Fayette county. The ration does not charge that it lies in the 9th land disbut only in the 9th district of originally Fayette cy. If you believe from the evidence that the land ibed in the writ is the land that is sued for, and is the land as is described in the declaration, and that and lies in what was known or called the 9th district ginally Fayette, even though it be the 9th militia ct, then, so far as this question is concerned, you may or plaintiffs."
- ) Because the court rejected evidence offered to show alue of clearing of land done by defendant during fetime of the life tenant.
- Because of the admission of other testimony, the ds of objection not being stated.
- .) Because the verdict is contrary to law and evi-
- motion was overruled, and defendant excepted.
- V. LATHAM, for plaintiff in error.
- T. Dorsey, for defendant.
- on, Chief Justice.
- s action was brought to recover land alleged to have he property of the father of the plaintiffs, and in sion of which he died. The jury found for the plaingainst one of the defendants, George Peters,—the Hosea Peters, disclaiming title,—the premises in disnd four hundred dollars mesne profits. A motion 70-23

for a new trial was refused, and on that judgment refuthis motion, error is assigned here on the grounds to in it.

- 1. There was no error in refusing to continue the conthe facts disclosed in the record. Those facts sho gross laches in the defendant.
- 2. There was none in admitting the will in evide The objection was that one witness made his mark, did not swear to the will, on the probate thereof before ordinary. It was proved there in common form by other witnesses, according to law, and was admiss (Code, §2423); and was conclusive, after seven years, agas these parties. 46 Ga., 361, 9th head-note.
- 3. The dower proceedings were properly admitted. widow occupied the land as dower, and that cured irregularities, if any. 41 Ga, 42.
- 4. The court did not err in not continuing the case cause of the amendment of the declaration. No alletion of surprise, or of being less prepared to try, was marked, §3521; 52 Ga., 129; 49 Ib., 170.
- 5. The declaration alleged that the land was in the district of originally Fayette, now Campbell county. proof is to the effect that it was in the 9th militia distr but not land district. The court refused to non-suit pla tiffs on this ground, refused to rule out the testimony t it was the 9th militia district, and that everybody cal it the old 9th of Fayette, and refused to charge that i was not in the 9th land district, but in another land of trict, though in the 9th militia, the plaintiffs could not cover; but charged to the contrary that, if the jury believ the land was the land sued for in the declaration, thou a militia district was called the old 9th of Fayette, it ing described simply as the old 9th, then plaintiffs con recover if they showed title to it. Error is assigned these various phases of the same point. There is no er in the rulings thereon. The question was one of fact the jury. It was, does the proof cover the lot sued for

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it lot was in the old 9th of Fayette, now Campbell. If jury believed that the declaration, not stating that it in a land district at all, meant the lot which was in old 9th militia district and the proof showed this lot ne up to that description, it was sufficient to make the gata and probata agree substantially. The father of intiffs owned the lot. One witness swore that he had own it for fifty-two years, and it lay in the old 9th. The nt, viewed in all its lights, it strikes us, is purely technal and without merit.

There was no error in ruling out testimony about the ne of clearing the land by defendant to set off against one profits. The clearing was in the time of the life ant and the holding under her. The evidence was not missible. Dean et al., ex'rs, vs. Feeley et al., this term. Objections to the admission of testimony must state reasons or grounds thereof. All the rest objected to, some considered above, fall under this want of specition.

. The evidence is sufficient to sustain the verdict; the siding judge is satisfied therewith; and there being no terial error of law, this court will not disturb the vertand judgment.

udgment affirmed.

## GRAY vs. Convers, administrator.

o far as this case involves the questions decided when it was ere before, it is res adjudicata. This includes the fact that the in the superior court is the proper remedy against this attorey, and that his retention of this money either to secure his fees to indemnify himself as surety of the administrator, with the seent and by the agreement of the latter, is no defence to the ale.

was also held in the case cited that an arrangement between the ormer administrator and the attorney collecting money for the state, whereby the latter, being also a surety on the bond of the ormer, should retain the money so collected, for his own security,

### Gray vs. Conyers, administrator.

would not bind the administrator de bonis non appointed after t dismissal of the first administrator.

- (a.) That such arrangement was recited by the heirs at law in a petion for the dismissal of the first administrator, would not be the administrator de bonis non. No representation of the heirs law, in judicio or otherwise, would bind the administrator de bon non, he being no party to the proceeding, nor a privy thereto. I represents creditors as well as heirs, and the former cannot be co-cluded by admissions of the latter.
- (b.) The judgment vacating the office of an administrator is distinfrom the appointment of an administrator de bonis non to succeed him.
- If an erroneous judgment be entered on a proper verdict, it funishes no ground for a new trial, but should be reached by excepting to the judgment itself.
- (a.) The Code makes twenty per cent the legal rate of interest on sum collected by an attorney and not paid over, from the date the demand by the client; therefore, where, on a rule, the verdie was for the amount, "with legal interest," a judgment for twent per cent. was right.
- 4. The verdict is plain, and covers every issue.
- 5. The question of fees of the attorney was for the jury; they were disallowed as charges on the estate; and the finding was not contrary to law.
- (a.) Where an attorney collects money, and refuses to pay over the same when demanded, without legal reason therefor, fees with hardly be allowed him for making such collection. Of the validity of his reasons the court and jury will determine on the trial.

  April 10, 1883.

Res adjudicata. Attorney and Client. Administrators and Executors. Interest. Practice in Supreme Court New Trial. Before Judge FAIN. Bartow Superior Court July Term, 1882.

Conyers, administrator de bonis non of the estate of Felton, ruled Gray, as an attorney, for certain moneys alleged to have been collected by him on notes placed in his hands by Sumner, a former administrator of Felton's estate. The rule showed a written demand on Gray.

The answer admitted the collection of the money, and claimed that it was paid over to Sumner, except five per cent claimed as a fee for collecting the same, and \$400.00

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aimed to be due to defendant and A. Johnson, as attoreys, for services rendered to Sumner as administrator in uses brought against the latter in the court of ordinary, c. Movant traversed the answer, and denied the right of the attorney to fees.

Pending the rule, plaintiff filed a bill praying a ne exeat gainst the defendant. The nature of the case and the alings thereon will be found fully reported in 67 Ga., 329. It is unnecessary to set out in detail the conflicting evidence in support of the rule and answer.

The jury found the following verdict: "We, the jury, and for plaintiff three thousand and six  $\bar{\sigma}_0^{7,5}$  dollars, four undred dollars charged by Gray & Johnson, two hunced and twenty and  $\bar{\tau}_0^{1,6}$  dollars by Gray & Gray, and one undred and eighty-eight dollars charged by Sumner, with gal interest."

Defendant moved for a new trial, on the following nong other grounds:

- (1.) Because the court charged, in effect, that the stateents contained in a petition by the heirs at law of Felton r the removal of Sumner, as administrator, to the fect that he had loaned this money to Gray, were not ridence against the administrator de bonis non.
- (2.) Because the verdict does not decide the issues made the case.
- (3.) Because the court entered judgment with interest twenty per cent from the date of the written demand.
- (4.) Because, since the verdict, defendant has tendered the plaintiff the full amount which he admits to be due, and now tenders it, and says that he does not by the tener admit that he owes as attorney, but says that it is the mount and interest thereon deposited in his hands by umner. [The letter in which this tender was made secreted that Gray had settled with Sumner, administrator, but that prior to the revocation of Sumner's letters, the turned over to Gray \$3,006.75 as the money of the state of Felton, deceased, and requested that Gray, as one

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of his bondsmen, would take the money and pay it out the parties legally entitled to it. Gray thereupon offer to pay this sum with seven per cent interest, also to p \$200.00, being half of the Gray and Johnson fee, w seven per cent interest thereon; asserting, however, the by such offer he made no admissions as to his liability Conyers, administrator, replied to this tender that would receive the money and give a receipt for the amount, without admitting anything further than the parties of so much money. This Gray refused.]

The motion was overruled, and defendant excepted.

W. K. MOORE; C. D. McCutchen; L. E. Bleckley, plaintiff in error.

J. B. Convers; Graham & Foute, for defendant.

Jackson, Chief Justice.

This was the trial of a rule against the attorney eployed by the former administrator upon an estate, broughy the administrator de bonis non on the same estate, a ing upon the attorney to pay over funds in his hands longing to the estate and collected by the attorney whin the employment of the former administrator.

Under the ruling of the court, applied by the jury the facts proved, a verdict was rendered for the plain for the sum collected with twenty per cent damages; annum from the time of demand on the attorney, a refusal to pay said principal sum and interest to that da

A new trial was refused, and the attorney excepted; assigns for error here the refusal of the new trial on vaous grounds alleged in the motion therefor.

When analyzed, the legal grounds pressed before amount to these. That rule is not the remedy at a that if the remedy, the court of ordinary and not the surior court would have jurisdiction to rule the attorney this case; that the plaintiff in error was the attorney to

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e estate, but of the former administrator; that hence relation ceased with the discharge of that administrathat allegations in the petition by the heirs at law to narge the former administrator and to appoint another, he ground that the former administrator had loaned money collected by this attorney to the attorney himor had confided it to him as surety on the adminison bond, bound the administrator de bonis non and oped him from ruling the attorney for the same money torney at law; that since the verdict he, the attorhad tendered the principal and interest on the sum cted, deducting fees, etc., and that a new trial should be ded, because the administrator de bonis non had re-I that tender; and that a new trial should be granted. use the judgment was entered up for twenty per cent ages.

This case was before us on a writ of error to a judgt of the superior court, or rather the chancellor, denyhe application by the administrator de bonis non for it of ne exeat to restrain the attorney from leaving the pending this rule before the superior court. y of the assignments of error now made and pressed were necessarily and really decided then. were so ruled, the case, being between the same parties, adjudicata. Necessarily to the grant of the ne exeat to ent the attorney from leaving the state pending this rule, it must have been held that he could be ruled that rule was the remedy that rule before the supecourt was the proper particular remedy, that court ng jurisdiction; that the attorney was the attorney of state, and liable to its representative on a rule 'or the ey collected for it and that it could not be retained. r to force fees out of the estate, or to hold it as secuto indemnify the attorney for any losses he might in as surety for the former administrator. a., p. 329. There it is distinctly ruled that, though attorney was also one of the sureties of the

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former administrator, and having been ruled by the admi istrator de bonis non for the money, answered that he h offered to pay it if his fees and those of associate coun employed by the former administrator were allowed, a that he no longer held the money as an attorney, but save himself as surety on the bond, he having paid t money to the former administrator who returned it to h for that purpose." Yet, notwithstanding these facts, was ruled that, "the respondent ought to pay the mon collected for the estate to him whom the law clothed wi authority to receive it. His reasons for refusing to p are not all sound in law. If, as he claims, some few hu dred dollars' worth of fees are due him, \* \* \* the exte to which equity will permit him to go is to retain enough to pay those fees, but surely he should not keep the sever thousands he has of the money collected for this esta in order to force it to a settlement of his fees," e "Nor will it allow him," the court goes on to say, " retain the funds of the estate collected by him in order indemnify himself as surety of the administrator, wheth the former administrator, whose surety he was, agreed th he might do so or not," etc.

Further on the court go on to say that these defend are a "thin veil," and they are distinctly held to be unterable as defences to the rule,—this identical rule then pending for trial, and which has been tried, and is here now a motion for a new trial.

So that the points, that a rule before the superior cours a legal remedy to get this money from this attorned and that his retention of it, either to secure his fees or indemnify himself as surety of the administrator, with he assent and by his agreement, is no defence to the rule, at expressly adjudicated in a case between these same paties and on this same subject-matter, and must be result judicata, if anything can be.

2. The point, too, that the recitals in the petition of the heirs at law, of such an agreement between the attorner

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1 the former administrator would bind the present adnistrator de bonis non, must fall for the same reason. is court held in this case, when here before, that such arrangement would not be a valid defence to the rule. not a defence to the rule, cui bono is the evidence of it her admissible, or sound and valid when admitted? But a new question, we should hold that no representation the heirs at law, in judicio or otherwise, would bind the ninistrator de bonis non, for the simple reason that he no party to the proceeding, nor is he privy to it. resents creditors as well as heirs. icluded by admissions of the heirs at law? No more is ir representative. True, his appointment could not we been made if the place had not been vacated, but judgment vacating the office is distinct from that filling vhen vacated; and the reasons given or recitals made the purpose of vacating it are equally distinct from the gment filling the vacated office, and the reasons or recior qualifications of the new appointee which caused appointment. The one caused the appointment of a ticular person; the other made a place vacant to be ed by anybody.

3. The judgment for twenty per cent. damages is no und for setting aside the verdict and granting a new il on the facts. It is no exception to the verdict, but to judgment, as illegal in not being authorized by it. It incorporated in the motion for a new trial as one of the endments thereto, and it is not a motion in arrest of judgment. But if it were, we see no error in it. The le explicitly makes that rate the legal interest from the mand by the client, and the verdict gives the legal erest. Code, §3950: 14 Ga., 584.

. The verdict is plain and covers every issue.

The question of the allowance of fees was for the y. They were disallowed as charges upon the estate. cannot say that it was contrary to law to disallow them such charges. Fees to collect money by counsel are

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hardly payable, if the money be not paid over when collected and demanded, without legal reasons therefor; and of the validity of those reasons the court and jury will determine on the trial, upon the law and facts of the case. It will do the client little good to collect and not pay over. To force him to litigate to get the money from his lawyers is to make him incur fees to other lawyers, and he ought not to pay both.

These principles cover the issues made by the motion for a new trial, and the errors assigned here thereon.

The result may bear hardly on the counsel of the for-

mer administrator, but the counsel must look to that administrator personally for remuneration for services rendered for his personal benefit. The estate ought not to pay for services to an administrator to prevent his removal, or for advice which led to that result, or for money collected which it was forced to litigate in order to realize.

Taking the whole case together, and applying to the facts the principles of law ruled in the *ne exeat* between the same parties, and the principles equally clear which apply to points not then ruled, we do not see such errors as will authorize this court to set aside the verdict approved by the presiding judge and to award a new trial on the facts.

Judgment affirmed.

Cited for plaintiff in error: 1 Har. & Wol., 310; 3 Adol. & El., 129, 22 Tex., 327. Code, §§417, 3627, 2537; Weeks on Attorneys, 143 et seq.; 5 Ga., 56; 6 Ib., 432; 9 Ib., 150; 57 Ib., 528; Code, §§2543, 1889, 406, 1253; Greenleaf Ev., 41; 19 Ga., 582; 54 Ib., 508.

For defendant: 11 Ga., 331; 58 Ib., 221; 5 Denio, 640; Weeks on Attorneys, 268; 1 Sug. on Pow., 214; 2 Wms. Exrs., 906; 1 Story Eq., 296; 47 Ga., 73; 4 Russel, 272; 47 Tex., 130; 26 Conn., 213; 11 Wall., 484; 4 Barn. & Ald., 47; Weeks, 94; 24 Ga., 561; 57 Ib., 313; 64 Ib., 205.

Powell vs. Cheshire.

### Powell vs. Cheshire.

case was brought forward from the last term, under 24271 (a) of the Code.]

bill in equity to enjoin a trespass upon realty by felling timr, is not such a suit respecting the title to land as must be ought in the county where the land lies. The proper venue of the a case is the county of the residence of a defendant against from substantial relief is prayed.

If the court in which a case is brought, has no jurisdiction to try a same, it will be dismissed whenever the court is apprised of

ch fact.

demurrer to a bill in equity upon the ground that there is an ple common law remedy, must be filed at the first term.

Where an agreement was made to consider a general demurrer want of equity as having been filed at the first term, it not have been in fact so filed, such general demurrer will not be considered raising the question whether an ample remedy exists at law.

A bill having been demurred to and an amendment made in rerd to material matters, the original demurrer does not relate forrd and cover both bill and amendment.

court of equity, having proper possession of the case, may grant ief, not only by staying waste or trespass to the freehold for the ture, but also by giving damages for the past; and that, whether is case be founded upon privity of title or not.

To give equity jurisdiction, the injury must be irreparable in mages or the trespasser be insolvent, or other circumstances (such the avoidance of circuity and multiplicity of actions) must exist, adering the interposition of a court of equity necessary. If the spass or waste be so destructive of the estate or of some vital cessity to the enjoyment thereof, and so ruinous as not to be cable of actual measurement in money, equity will interfere.

Where a farm of ninety acres contained but seventeen acres of coded land, the preservation of which was essential for the proper so of the farm, as well as for use as a building site for the owner's cidence, for which a portion of it had been prepared, many of the ses being large and of ancient growth, a destruction of such trees a naked trespasser, without title or claim of right, leaving the ener without wood, shade or proper building site, would give bound for equitable relief.

bruary 20, 1883.

quity. Practice in Superior Court. Jurisdiction. Contional Law. Before Judge HILLYER. Fulton Superior t. April Term, 1882.

Powell rs. Cheshire.

Reported in the decision.

J. T. PENDLETON; GEORGE N. & D. P. LESTER, for plain error.

CANDLER & THOMSON, for defendant.

JACKSON, Chief Justice.

This bill in equity was filed to stay waste by writ of junction. The complainant alleges title to, and posses of, a tract of land in DeKalb county, used by him: farm, and upon which he was preparing to erect a dw ing-house as a residence; that some seventeen acre said land was wooded, and was the only woodland on tract of ninety-two acres; that defendant, without title claim of right, was cutting down the timber on those enteen acres; that he had destroyed many trees, and still engaged in cutting down and destroying others; that, among those thus destroyed, were trees where he cleared up the undergrowth and cleaned up the spot the purpose of erecting his residence thereon; and thus his entire place was being ruined and wasted h naked trespasser, by the destruction of all the tim thereon essential for the farming purposes of the tract, the killing and destroying the shade trees which the c plainant had thus prepared and reserved for the surrou ings of the contemplated residence; and thus that damage to the farm and the part of the land reserved said residence, was incapable of being computed in mor and irreparable.

To this bill, after several terms of the court had elaps a general demurrer, for want of equity therein, was fill Counsel for complainant agreed that this demurrer sho be considered as filed at the first term. After this agreement, an amendment was made to the bill, and to the last amended, no demurrer was filed.

The court dismissed the bill, and complainant except

#### Powell rs. Cheshire.

If the court had no jurisdiction, the court should have missed it whenever apprised of that fact; for it would a vain thing to try a case, where it had no authority or isdiction to decree relief. So that the first question is, the court of equity in Fulton county have jurisdiction he cause, the defendant residing in Fulton and the land DeKalb?

Equity causes are to be tried in the county of the resisce of a defendant against whom substantial relief is yed. Constitution, Art. 6, sec. 16, par. 3, Code, §5169, sees respecting titles to land must be tried where the d lies. Code, §5168, par. 2 of the same title and sections two paragraphs must be construed so that both cannot and neither be annulled.

f, therefore, the relief prayed for in the equity cause, not to recover land, and in that sense affect title, the rt of the residence of the defendant would have the esdiction; but if its purpose was, and the relief prayed is, to fix title, then the question of jurisdiction would more difficult of solution, and the effort to reconcile the paragraphs of the constitution so as to vitalize both, ald not be so easy. This cause is not to try title, but tay waste. Title may be drawn into the trial, but it is incident, not the gravamen of the bill.

But we think that this court has settled the principle t covers this cause. It has been ruled squarely that an on of trespass quare clausum fregit, must be brought he county of the defendant's residence.

Caragraph 6 of the same section of the same article, ich is, in effect, the same as in prior constitutions, reres all other cases to be tried where defendant resides.
Her cases than what cases? Those classes of cases preless provided for, is the clear answer. One class of
se is cases respecting land titles, in paragraph 2. Yet,
repass quare clausum fregit, it was ruled in 34 Ga., 509,
135 Ga., 144, should be brought in the county where the
endant resided, though the land lay in a different county.

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That writ, at common law, affects title to land as much as this equity suit can. The one is to put a stop to trespass, by final decree for injunction; the other is to recover damage therefor. Neither can be successful unless the title, by possession or deed, be exhibited to the court and if the jurisdiction of the law court be clear in the county of residence, the jurisdiction of the equity court as clear. See, also, 34 Ga., 53, 62, which appears to settle the point in equity cases.

2. Was the bill legally dismissed because the complain ant had an adequate and complete remedy at law? could not be, because the demurrer set up no such groun which it should have done. That demurrer must be file at the first term, or it will not be heard. The other juri diction must be pointed out to the complainant at one in limine, so that he may go there without delay. The general demurrer, for want of equity, need not absolute be filed at the first term. Therefore, we think the could not dismiss the bill on the ground of complete remedat law, because it could not legally have done so.

Moreover, we think that the agreement must be construed in the light of the demurrer. It is an agreement to try that demurrer for want of equity in general, and not a demurrer which could not, at that late stage, has been filed at all. At all events, this is all which we agreed to; and we have seen that it should have specificating ground, if that was to be relied on. In addition to a this, the bill tried was not demurred to at all. That bill the bill as amended. After the amendment, there was indemurrer at all.

3. But however that may be, it seems clear that the beshould have been retained and a decree had thereon, without regard to the completeness of the remedy at law, unless was not in the power of a court of equity to grant relief. Be it is in the power of courts of equity to grant relief, nonly to stay waste or trespass to the freehold for the form

### Powell vs. Cheshire.

e, but to give damages for the past. Story's Eq. Jur., 5, 518, 917.

his jurisdiction was originally confined to cases founded privity of title, but was afterwards enlarged, so as to brace cases of adverse claims and rights not founded privity. Story's Eq. Jur., 918; Eden on Inj., ch. 9, p. to 196; ch. 10, p. 206 to 214. To give jurisdiction to ity, the trespass or waste must be destructive to the ate, or, in other words, so ruinous as not to be capable in accurate measurement in money, or so destructive something of such vital necessity to the enjoyment of 's estate as that money cannot well give compensation refor; or, as laid down in the Code of Georgia, where e injury is irreparable in damages, or the trespasser is olvent, or there exist other circumstances which, in the eretion of the court, render the interposition of this writ injunction) necessary and proper, among which shall the avoidance of circuity and multiplicity of actions." 'he fact; alleged here, we think, make a case within se rules of law defining the limits within which equity l interfere by injunction. If the shade trees, necessathe growth of years, in some instances of centuries, nding in a man's yard where he has built his residence, s about to build it, are being cut down and destroyed, hing but time, and time beyond a generation, can lace them. It is impossible to estimate the value the homestead in money. It is irreparable in dams. If the only timber on a ninety acre farm is becut down, and all forest vegetation laid waste, so that hing will be left to shade man or beast in toil or in , in the field or the pasture,—nothing to repair fencing nend the fire, it would be very difficult to ascertain the nage in money. In either case, both of which appear his bill, how can damages be estimated at all? Is not waste destructive to the freehold as a farm, for farming poses, and almost equally so to the freehold chosen as spot for a residence, and cleared of undergrowth for

that purpose? Especially should equity arrest such estruction where the defendant is a mere naked trespass without shadow of title or right to the land.

The case is without the principle ruled in 62 Ga., 1 and others cited by defendant. See 1 High on Inj., 7 726, 727, and cases cited there. 11 Am. Dec., pp. 500, 50 14 Md., 152.

Judgment reversed.

# Anderson vs. Clark, administrator.

1. When this case was here before, it was held that, where a suit v brought in Georgia on a judgment recovered in Tennessee af the defendant had been adjudicated a bankrupt, but before final discharge, though no plea of bankruptcy was filed or stay proceedings asked, still the discharge in bankruptcy was a go defence to the suit in Georgia, the foreign judgment not constituting a new debt, but only a security for an old debt.

2. The effect of the grant of a new trial by this court is to require to case to be heard de novo, unless some specific direction be given regard thereto; and, on the subsequent trial, new facts may shown, making a different case, and other principles of the known may control and apply to these new facts.

3. Where, pending a suit in Tennessee, the defendant pleaded the had been adjudicated a bankrupt and prayed a stay of proceedings, but subsequently withdrew the plea and confessed judgment such conduct amounted to a new promise to pay and an agreement that the judgment should bind him, and precluded him, in a subsequent suit on the judgment, from making any defence which are prior to the confession, including the defence of bankruptcy. Under such facts, the plea of bankruptcy would not avail as a defent to the suit in Georgia.

(a.) The character of the debt on which the suit was brought appearing, the presumption arises that the debt was one from which the defendant knew that he could not be discharged und the bankrupt act, or that it was one so binding on his conscient as an honest and moral man, that if he acquired means, he would not be discharged und the bankrupt act, or that it was one so binding on his conscient as an honest and moral man, that if he acquired means, he would not be discharged und.

(b.) A solemn admission in judicio is an estoppel everywhere a forever; and the facts stated amount to such an admission.

April 10, 1883.

Bankruptcy. Contracts. New Promise. Judgment

ppel. New Trial. Before Judge FAIN. Catoosa Surcourt. August Term, 1882.

is is an action brought by J. H. Anderson against , administrator of J. M. Anderson, deceased, in the ior court of Catoosa county, on a judgment obtained e chancery court of Hamilton county, Tennessee, st defendant's intestate. The following agreed stateof facts was read to the jury as evidence in the case: on the 12th day of April, 1873, J. H. Anderson began tion against J. M. Anderson in the chancery court milton county, Tennessee, to recover the amounts ed to be due on certain notes. The defendant was arly served, and the court had jurisdiction of the es and the subject-matter of the suit. This suit was ing on the 23d day of March, 1874, when J. M. Ann was regularly adjudicated a bankrupt on his own on. On the —— day of April, 1874, a suggestion nade in said chancery court of the said adjudication nkruptcy, as follows: 'In this case, the bankruptcy of ndent, J. M. Anderson, being suggested, it is ordered said suggestion be entered of record; but as complainesires to controvert the validity of the adjudication nkruptcy, the parties are allowed to take proof and ne suggestion.

fterwards, on the 14th day of April, 1874, said sugon of bankruptcy was withdrawn by defendant, as vs:

the this case, the parties, by their solicitors, appeared, he suggestion of bankruptcy of J. M. Anderson, heremade, is withdrawn by respondent's solicitor; and upon, it is ordered, by consent of parties, that this proceed as though no bankruptcy had ever been ested; and by consent, this cause is continued until term, and remanded to the rules for proof generally oth sides.'

n the 10th day of April, 1875, the said J. M. Anderson

filed his answer to complainant's bill, in which he respon to the merits of complainant's said suit, and did not se any plea of bankruptcy, and did not refer to any pend bankruptcy proceedings.

"On the 12th day of April, 1875, the following final cree was rendered:

"Be it remembered that this cause came on to be he

before Chancellor Key, on the 12th day of April, 1875, the respondent, J. M. Anderson, confesses judgment to complainant for the sum of five hundred and twenty-dollars, the amount of the notes filed as exhibits to c plainant's bill, with their interest. It is, therefore, decreby the court that complainant recover of said respond J. M. Anderson, the said sum of five hundred and twenty-one dollars, together with all cost of the cause not here otherwise adjudged, for all of which execution may issue the said sum of the said sum of the cause not here of the said sum of the said sum of the cause not here of the said sum of the said sum

"And defendant agreed that said suit in Hamilton cour Tennessee, in which said decree was rendered, was reg in all respects, and that the decree rendered is binding of force, unless the same is affected by the discharge bankruptcy.

"On the 11th day of December, 1875, the defendant M. Anderson, was regularly discharged by the banks court, as provided by the bankrupt law, from all his pable debts."

No other evidence was submitted.

The court charged the jury: "If you find that, pend the suit in Tennessee, upon which this suit is predica a suggestion of bankruptcy was made by defendant, who suggestion was afterwards withdrawn by defendant, the parties went to a trial on the merits, and afterwards defendant in said suit confessed a judgment for the amount of the sued for in this case, after the adjudication in bankrup a discharge thereafter obtained would not discharge defendant from the debt on which judgment was confespending the bankruptcy proceedings."

The jury returned a verdict for the plaintiff, on wh

lgment was rendered. The defendant moved for a new al, on the following grounds:

- (1). Because the verdict is contrary to the evidence d the law, and without sufficient evidence to support the ne.
- (2). Because the court erred in charging the jury as ted above.

The motion was granted, and plaintiff excepted.

McCutchen & Shumate; W. H. Payne; L. E. Bleckley, plaintiff in error.

A. T. HACKETT; R. J. McCAMY, for defendant.

ckson, Chief Justice.

1. When this case was in this court before, reported in Ga., 518, it was held: 'Where, to a suit brought in orgia on a judgment rendered in Tennessee, the defendant eaded his discharge in bankruptcy, and it appeared that was adjudged a voluntary bankrupt pending the suit in nnessee, but failed to plead that fact or to ask a stay of occeedings on that account, and the judgment was subjuently rendered, and he thereafter obtained his ocharge, that the plea was a valid bar to a recovery; d that the Tennessee judgment did not constitute a new bt, but simply a new security for the old debt, and, of elf, had no force or effect in Georgia.'

That decision having been rendered in this identical se, between the same parties, the administrator, Clark, ving been made a party, in lieu of the deceased defendt, must stand. The case is res adjudicata of this case, far as that ruling applies.

2. But the judgment then rendered, sent the case back for new trial, and on the new trial, a different state of facts was ide. The effect of the grant of the new trial, is to order to case heard *de novo*, unless some specific direction be

given by this court in regard to it, and the new facts on the new trial may make a new case, and other principles of law may control it, when applied to the new facts. 56 Ga., 520; 15 Ib., 653.

3. Two new facts appear in the case now, which vary it from the case then ruled. First, that the adjudication of the defendant as a bankrupt and the pendency of the bankruptcy proceedings was suggested or pleaded to stay proceedings, but afterwards withdrawn; and secondly that the defendant confessed judgment, and thus, upon a judgment confessed after the withdrawal of the plea of the adjudication of bankruptcy and the pendency of the proceedings in the bankrupt court, the suit of the plaintiff So that the question now before us is, does the confession of a judgment, after the defendant has been adjudicated a bankrupt, and after he has withdrawn a plea to stay proceedings to await the determination of his final discharge, amount to a new promise to pay the debt? Or does it, in connection with the withdrawal of the plea of adjudication and pendency of proceedings to be discharged in bankruptcy, raise the presumption that the defendant's debt was of such a nature as not to be provable in bankruptcy, or such as he felt bound to pay, though bankrupt, the character of the debt not appearing in the agreed statement of facts?

In 62 Ga., 298, it was held that a mere parol promise to pay a debt, after discharge, was based on a moral obligation, and bound the bankrupt to pay it. The case before us is a promise to pay the debt, in the most solemn form known to the law. It is a promise in judicio. It is a voluntary recognition of the debt, after the adjudication of the defendant as a bankrupt, as a debt of record. It is not only in writing, but stamped upon the records of a court of record. It is stronger and more solemn, as a recognition and obligation to pay the debt, than a promise under seal, or a covenant would be. It is a recognition of the debt as valid, after the adjudication in bankruptcy, and an agree-

nent that it shall bind the defendant so strongly as to prelude him from making any defence to it which arose prior to he confession. It is an agreement that execution may ssue upon the confession, and that all the property of deendant, which he may acquire afterwards, shall be seized nd sold, if in Tennessee, and if in any other state of the American Union, shall be liable, whenever by it and on it, vithout other proof, judgment shall be rendered in such ther state, and execution be issued thereon. It is a conession, made with full knowledge of his right to stay a orced judgment until his discharge, and with a plea to hat effect, which would have stayed it, and eventually, fter his discharge, if obtained, would have barred it forver, if provable in bankruptcy. This plea is withdrawn, and then this judgment is confessed. The legal effect of this onduct of defendant is equivalent to saying, in the presence of the court, and writing it on the records thereof: This debt I will pay, whether I am discharged or not rom it finally by a judgment of the bankrupt court. I vithdraw the plea of adjudication and the pendency of my pplication for discharge from my debts, in this case. except this debt from that discharge, if I obtain it, and I gree of record here, that my discharge from all other lebts shall not affect my liability to pay this."

The presumption arising on these facts is overwhelming hat the defendant knew that this was a debt from which he could not be discharged, under the bankrupt act, or hat it was one so binding on his conscience as an honest and moral man that, if ever he acquired means, he would pay it.

A solemn admission in judicio is an estoppel everywhere and forever; and these facts of record amount to an dmission that, for some good reason, this defendant agreed withdraw his plea of adjudication as a bankrupt, and to onfess a judgment, and not to set up the plea of bankruptcy to this debt, made by himself a debt of record.

In Steadman vs. Lee, 61 Ga., 58, it was held that, if a

bankrupt, after his adjudication, and before his dischars suffered a judgment to go against him, without a plea stay proceedings until final discharge, such judgment walid, and would bind his property, notwithstanding discharge afterwards. Much more would it be valid after having pleaded the stay, he withdrew the plea a confessed judgment. It seems that Judge Hawkins me conceived the facts and force of the decision in Steadmers. Lee, when this case was here before, for he says the judgment was obtained after the discharge in barruptcy, whereas, it was before final discharge, as in tease at bar.

So that, applying our own law to this case, the plea the discharge in bankruptcy is not good. That the law Tennessee, which controls, on the effect of its judgment fully as strong in favor of plaintiff in error, if not strong see Code of Tennessee, section 3107; 2 Lea, 729; 4 Baxt 300; 2 Caldwell, 325. See, also, Revised Stat. U. S., 510 1 Smith's Leading Cases, 793.

Judgment reversed.

# THE CITY AND SUBURBAN RAILWAY OF SAVANNAH vs. BRAU

- If a contract imposes a legal duty upon a person, the neglect that duty is a tort founded upon a contract. In such a case t liability arises out of a breach of duty incident to and creat by the contract, but is only dependent upon the contract to the tent necessary to raise the duty. The tort consists in the brea of duty.
- (a.) Wrongs, into what classes divided.
- (b.) Private duties may arise from statute or flow from relation created by contract, express or implied. The violation of any suspecific duty, accompanied with damage, gives a right of action
- (c.) This is not a suit to enforce a contract. Both the counts in the declaration set forth the duty imposed by the contract, and allege its breach in this respect. They also alleged the facts that sho the wrong from which the law will presume damage to flow. The averred no special damage in any form, and did not even give the terms of the contract specifically. Defendant pleaded not guilt.

plea appropriate to an action ex delicto. The court did not, therere, err in refusing a non-suit, on the ground that the action was

e ex contractu, with no actual damages shown.

me evidence for the plaintiff in an action against a street railway impany showed as follows: Plaintiff and his wife entered a reet car, and presented to the conductor tickets entitling them to de to their point of destination. Plaintiff informed the conductor where he wished to go. Between the beginning and the end the journey it was necessary for plaintiff to be transferred from the car to another, and he was transferred personally by the conductor of the first car, but was given no transfer ticket, nor did he now that one was necessary. Subsequently the conductor of the second car called for a transfer ticket or another payment of re, and in default thereof ejected plaintiff and his wife, requiring them to get off the car in the mud a short distance from the street cossing, and in the presence of a number of people:

, that the case was one authorizing exemplary damages in a suit

gainst the company.

The court below committed no error in the rule of damages laid own in his charge, nor in overruling objections to the plaintiff's estimony that his feelings were hurt. The law was correctly laid own, and there was no abuse of discretion in refusing to set aside we verdict and grant a new trial on the ground that the damages and were excessive.

The verdict, in addition to stated damages, having found attorey's fees without specifying the amount thereof, such portion of ne verdict was illegal and without meaning, and may be disresarded.

lay 1, 1883.

Actions. Contracts. Torts. Damages. Verdict. New al. Before Judge Harden. City Court of Savannah. Tember Term, 1882.

Brauss brought suit against the City and Suburban Raily of Savannah. His declaration contained two counts, first of which alleged, in brief, as follows:

The defendant was a common carrier for hire, of passens by street cars, in the city of Savannah. Plaintiff entered of defendant's cars on Anderson street and became a senger, and the defendant received the usual and custary fare, and became bound to convey plaintiff from derson street along Abercorn street to Liberty street,

and then to give to plaintiff a transfer ticket, by virtue which another of defendant's cars would carry him fi Liberty street to his place of residence. Defendant's ago however, neglected and refused to give plaintiff a tranticket, and upon receiving his fare, informed him t such fare would entitle him to ride to his destination; thereupon, at Liberty street, the conductor of the first stopped the Liberty street car and personally transfer plaintiff thereto, placing him under the charge, care protection of the conductor of the second car. But latter subsequently demanded payment of fare or the duction of a transfer ticket from plaintiff, and upon plaintiff, tiff's failure to comply with the demand, ejected him the middle of the street, requiring him to get off in mud; and the defendant broke its contract of carriage w The car was crowded with passengers, and plain was mortified, disgraced and damaged by such expuls Plaintiff complained to the company of his treatment, was willing to come to a settlement of his damages, the latter refused to pay him anything, and thereby came liable to him for counsel fees for stubborn litigious conduct.

The second count alleged substantially the same fa and in addition alleged that no transfer ticket was nesary at the junction of Abercorn and Liberty streets. The evidence for the plaintiff was, in brief, as follows:

On Sunday afternoon, April 30, 1882, he and his viboarded defendant's car at the junction of Anderson Abercorn streets. He had purchased some street tickets two days before, and had three of them left. inquired of the conductor whether these tickets would sufficient to carry him to his destination. The latter that they would. He thereupon gave a ticket for him and one for his wife, and informed the conductor that desired to be transferred at Liberty street to the car will would carry him to his home. On reaching Liberty street conductor of the car in which plaintiff was, hailed

ductor of the Liberty street car, and informed him that had a transfer. The latter stopped, and plaintiff and wife entered the Liberty street car. After it had ted, the conductor called upon plaintiff for his fare. intiff claimed that he had been transferred, but the contor insisted that he must have either a ticket or a fare. intiff had no money in his pocket at the time, and deed to pay. The conductor stopped the car in the midof the block, and plaintiff and his wife were compelled get out in the mud and walk home. The conductor's nner was "very short." There were about thirty peoin the car, and he was much ashamed and wounded in feelings when required to leave. On Monday morning owing, he met the president of the company, and comined to him, telling him that he wanted satisfaction. president responded that he would see the superintend-Plaintiff said he wanted satisfaction. The president he could give him none. If the necessary apologies reprimands had been made, there would have been suit. Plaintiff did not know of the requirement of a nsfer ticket at the point where the transfer was made. another junction on defendant's line, he had been transed without a ticket, and transfers were so made at that ce. On the succeeding day, a witness, to test the nt, rode over the same track, and was transferred witha ticket.

The evidence for the defendant was, in brief, as follows: Abercorn street car was what is known as a "bob-tailed", in which passengers deposit their fares in the box, the driver or conductor is not allowed to receive them. It defines a conductor on the cars, and would then receive fare. There was a ction on defendant's line, where passengers were perally transferred from one car to another, but the Abern and Liberty street cars did not ordinarily connect heach other, and transfer tickets were required, and ice to this effect was published. The conductors were

furnished with transfer tickets, and required to fur them to passengers, upon application therefor. No d application was made for transfer tickets by the plain nor did the conductor of the Abercorn street car ren ber the conversation detailed by plaintiff. The Lib street car happened to be behind its usual time, and the The conductor of the Liberty street car h some one hail him, and on stopping, plaintiff and his boarded the car. It was his duty to require train tickets or money from passengers for the payment of f Plaintiff declined to furnish either, saying that he been transferred from Abercorn street. The condu could not, under the rules of the company, accept su statement from a passenger in lieu of fare, and he compelled to require plaintiff and his wife to leave Plaintiff said he was near home and it made no ference. There was no ill-will toward plaintiff on the pa the conductor. He did not consider it his duty to put the at a crossing, but stopped the car where he did because was near the curve of a switch, and the rule was not to on a curve.' The president denied any discourtesy to p tiff, but said that he could not reprimand drivers wit investigation, as frequent attempts were made to e the payment of fare, and upon investigation thereof became satisfied that the conductors had acted prop The jury found the following verdict:

"We, the jury, find for the plaintiff the amount of attorney's fees and costs of court, as established by practice of this court, and further find for plaintiff in sum of fifty dollars (\$50) as damages."

Defendant moved for a new trial on the following group

(1.) Because the presiding judge allowed the said p tiff, against the objection of defendant, to testify as t feelings when required to leave the Liberty street c defendant, upon the failure and refusal of plaintiff to duce a ticket or pay his fare, it appearing from the dence that any wound to plaintiff's feelings was cause his own conduct in so refusing.

Because the judge, at the conclusion of plaintiff's nee, and of the evidence produced on his behalf, d, on motion of defendant, to non-suit said plaintiff ismiss said case, it appearing from said evidence and etition filed, that said complaint was for an alleged done by defendant's violation of its contract; that ase as presented was a case arising on contract; that the cual pecuniary loss or damage was proved, and that only damage claimed was exemplary damage for d injury to plaintiff's feelings.

Because the judge erroneously charged the jury as its: "If the conductor of defendant's car said or did ing which misled the plaintiff into going upon the car of defendant without a proper ticket or transfer, the company's fault; and while plaintiff was ejected a subsequent conductor, having the right to do so, the any would be responsible for the acts of both controls; the company would be responsible, although the actor of the second car acted right."

Because the general charge given to the jury was eous.

Because the judge erroneously charged the jury in nguage of sections 3066 and 3067 of the Code of ita, and in connection therewith charged as collows: it is to say, unless there be aggravating circumstances, annot give any except actual damages, but if there be vating circumstances you may give such damages as, ar opinion, would deter the wrong-doer from repeative wrong, or would be sufficient to compensate the diff for his wounded feelings; and in such case, that here there are aggravating circumstances, either in cet or the intention, it is not necessary to prove any all amount of damage; but whether damages should owed or not, and if allowed, how much, are exclumatters for the determination of the jury."

Because the judge refused, though requested by the dant in writing, to give the following charges to the

- (a.) "Exemplary damages can never be allowed in cases arising on contract."
- (b.) "If the jury find that the plaintiff, Mr. Brauss, got on the Liberty street car of the defendant; that the conductor, in accordance with the rule and custom of the company, demanded his fare or a ticket; that plaintiff failed and refused to pay such fare or produce such ticket; that the rule of the company required the conductor to collect such fare or ticket or to eject the party so refusing from the car, and that the conductor did obey said rule and require the plaintiff to leave said car, then I charge you that the plaintiff is not entitled to recover any damage for such ejection from the said car, in obedience to said rule of said company."
- (c.) "While a corporation may be liable for the torts of its agents in the prosecution and within the scope of its business, it cannot be made liable for such torts, unless the agent himself would be liable; that is, the defendant in this case cannot be made liable for the tortious act of its conductors, Nix and Finney, or either of them, unless they themselves would be individually liable."
- (d.) "A railroad corporation, when sued for a tort, is not liable to exemplary or vindictive damages unless the officer or agent of the company by or through whom the tort was committed would, if sued, be personally liable to such exemplary or vindictive damages. If, therefore, the jury believe, under the evidence, that Finney, the conductor or agent of the defendant, would not be personally liable, if sued for exemplary or vindictive damages, then the defendant would not be liable for such damages."
- (7.) Because the judge erred in giving to the jury, at the request of the plaintiff, the following charges in behalf of said plaintiff:
- (a.) "There is a difference between vindictive and compensatory damages. Vindictive are intended as a punishment upon the wrong-doer, and are inflicted upon the wrong-doer for the purpose of correction or example, to

he same party or others from the perpetration of a wrong in the future. Such vindictive damages are to the actual compensatory damages. But comory damages are allowed to the complaining party right, and are intended to make him whole, ctive of the motive of the wrong-doer, or even of od faith of the wrong-doer. Even good motives on it of the wrong-doer, and an honest belief that he is what is right and lawful, cannot lessen the damages the law allows as compensatory, though such honest and good motives would generally prevent the imposof vindictive damages in addition to compensatory es."

"If the jury find from the evidence that the feelings intiff were wrongfully wounded, and that there were ating circumstances in the act or intention, such ed feelings can be compensated, if the jury find he evidence in favor of Brauss, even though neither conductors bore any malice to Brauss or intended any wrong, and only acted in the performance of they believed to be their duty; now mark this, men: if they performed what they thought to be luty in an improper and aggravating manner."

"The plaintiff, Brauss, in order to recover compendamages for wounded feelings, need not prove any at or swear to any amount, though he must prove e is entitled to that class of damages. The enlightconscience of the jury is the guide the law prescribes he cases. The jury can give such damages as the instances of each case require, if such circumstances, ir opinion, require any damages at all."

Because the verdict is contrary to the law and the ace.

Because the jury undertook to find attorneys' fees, in instructed by the court that they could not find eys' fees unless they were proved to be due by the

evidence, and no evidence whatever having been introduced on the subject of attorneys' fees.

(10.) Because said verdict is uncertain and illegal, and no legal judgment can be entered up thereon.

The motion was overruled, and defendant excepted.

LESTER & RAVENEL; GEORGE A. MERCER, for plaintiff in error.

R. R. RICHARDS, for defendant.

HALL, Justice.

The errors alleged to have been committed in the progress of this trial may be conveniently considered under two general heads:

- (1st.) Is this an action for a tort, or an action upon a contract? Or is there a joinder of the two in different counts of the declaration, or a commingling of both in any of the separate counts?
- (2d.) If these defects do not exist, did the court, in its charge, lay down the proper rules for measuring the damages, under the testimony; and was the finding of the jury so excessive as to excite suspicion that it was the result of such gross misapprehension or undue bias upon their part as to authorize the judge, in the exercise of a sound discretion, to set it aside and order a new trial?
- 1. Wrongs are divided into criminal and civil, and the latter are subdivided into the two classes of wrongs ex contractu and wrongs ex delicto; the former being such as arise out of the violation of private contracts; the latter, commonly called torts, such as spring from infractions of the great social obligation, by which each member of the state is bound to do hurt to no man. Moak's Underhill on Torts, pp. 3 and 4.

In actions upon cases where the contract has been induced, for instance, by the fraud of the defendant, the party injured may either waive the tort and sue upon the contract, or he may proceed for the wrong. (Code, §§2955,

56); and in that event, the contract will not be counted though it will be necessarily shown, in order to make ppear how the wrong was injurious. The tort, in such ase, is connected with the contract only as it enabled e tort feasors to bring the party wronged into it Cooley Torts, p. 90, and cases cited in notes 1 and 2 there. de, §2951. If a contract imposes a legal duty upon a rson, the neglect of that duty is a tort founded upon a conct. 1 Addison on Torts, §27. And in such a case, "the bility arises out of a breach of duty incident to, and eated by, the contract; but it is only dependent upon contract to the extent necessary to raise the duty. The t consists in the breach of duty." Ib., note 1. ties may arise from statute, or flow from relations created contract, expressed or implied. The violation of any ch specific duty, accompanied with damage, gives a right action. Code, §2954.

rested by these principles, this is certainly not a suit to orce a contract. Both the counts in the declaration forth the duty imposed by the contract, and allege its ach in this respect; they also allege the facts that show wrong from which the law will presume damages low. They aver no special damage in any form, and not even give the terms of the contract specifically. o this action, the defendant pleaded not guilty, which ld not be an appropriate answer to an action ex contu, but is the proper answer to one ex delicto. no demurrer to this declaration; but the defendant ed until the plaintiff had closed his evidence, and then ed to non-suit and dismiss said action, upon the ground it appeared, from the evidence and petition filed, that omplaint was for an alleged wrong done by defendviolation of its contract; that the case, as presented, case arising on contract, and that no actual pecunioss or damage was proved, and that the only damage ed was exemplary damage for alleged injury to iff's feelings; which motion was overruled.

Waiving, for the present, the discussion of the character of the damages which the plaintiff was entitled, under his pleading, to prove and to recover, we think, as we have before shown, that this is an action ex delicto, founded upon the failure of the defendant to perform a duty imposed by its contract, and that the plaintiff was entitled to recover damages in consequence of this breach of duty, and that the motion was properly overruled.

2. We are next to consider what was the rule for estimating the damage in this case, and whether, for a breach of such a duty, nothing more than the actual pecuniary loss can be recovered, or whether the plaintiff is entitled to have compensation for his wounded feelings, in consequence of the indignity put upon him. The determination of these questions will dispose of most of the questions made in this case. Let it be borne in mind that the plaintiff had a right, according to the tickets which he presented, to be transported on the defendant's lines of road, from the point at which he entered its cars to his place of destina. tion, and that it was the duty of the defendant to transfer him from one of its lines to another as often as it was necessary to reach the end of his ride; that he was actually transferred by the conductor of the Abercorn to the Lib-It is true he had no transfer ticket, nor ertv street car. did he know that it was necessary for him to apply to the conductor for one; he had, however, stated to the conductor of the first car he entered, where he wished to go. The conductor cught to have known if it was necessary to have this transfer ticket, to reach his destination, and should have furnished it. He made the transfer, however, without doing this, and after this conversation, the plaintiff had a right to act upon the assumption that all had been done that was necessary to secure his passage; and seeing that such was his impression, the conductor should have furnished the transfer ticket without any further re. quest. It would be going very far to require a passenger to specify to the agents of the company what means and

iances were necessary to the accomplishment of the he had in view; it is the duty of these agents to supply tickets necessary, under such circumstances. ntiff was not in fault, and he should not be made to er for the negligence of the defendant's agents. properly on the cars with his wife, and had a right to here until he reached his destination. The demand e on him for his fare resulted from the wrongful negof one of defendant's conductors, and it can make no rence, so far as concerns the duty the company owed , that it was violated by another conductor, who was pprised of the actual facts in the case. It was the duty ne first conductor to have communicated to him this rmation. But it is not clear that he was without fault, here is sufficient evidence to show that the plaintiff transferred to his car, and he was so informed by the luctor when the transfer was made. The jury had a t to presume that he had this information, or might had it, if he had paid proper attention to what was ing, and that it was his duty to take notice of the fact. failure in this respect put the company in the wrong; in putting the plaintiff off the car, they are chargeable a breach of duty which their contract with him imd. The circumstances under which he was put off, and place where he and his wife were landed, were well ulated to wound the feelings and mortify the pride of man of ordinary sensibility. In every tort there may aggravating circumstances, either in the act or the ntion, and in that event, the jury may give additional ages, either to deter the wrong-doer from repeating respass, or as compensation for the wounded feelings e plaintiff. Code, §3066.

of street cars as to the conductors of railways. It is prehensive in its terms, and embraces every tort of y character and description, committed by every kind rong-doer, and visits upon the offender exemplary

damages, or damages to compensate for wounded fee

Surely, it cannot be seriously insisted that there was ing calculated to wound feelings in the plaintiff an wife being ordered from the car, in the presence of a ber of strangers, and landed in the mud in the midd the street, when there was a good crossing in close imity! That there was nothing in this indignity, to acterize it as mildly as possible, that was not well c lated to excite in the beholders thoughts of a very precial and derogatory character to the persons thus with! Is there no aggravation in this act, apart from intention in the wrong-doer, to excite such unpleasant flections, and thus inflict a wound upon the feelings. tling the party to compensation in damages? Is there thing in such conduct on the part of a conductor of a lic street railway car to shield him from exemplary ages, in order to prevent the repetition of such offer Should not a salutary lesson be taught, through this dict, to impress the necessity of caution upon these sons dealing so largely with the public? These ques have been answered affirmatively by this court in the considered case of Gasway vs. The Atlanta and West I R. R., 58 Ga., 216. The court below committed no in the rule of damages laid down in his charge, no overruling objections to the plaintiff's testimony that feelings were hurt. The law applicable to the cir stances entitling plaintiff to this action was correctly down.

There was no abuse of discretion in refusing to aside the verdict and grant a new trial, upon the grant that the damages found were excessive. To authorize interference as was invoked, the damages should have so excessive as to lead the court to infer that they were result of bias or prejudice upon the part of the jury. \$\\$3067, 2947.

The portion of the verdict that found attorneys' without specifying the amount, was illegal and wit meaning, and may, and doubtless will, be disregarded

Price vs White et al

court below, in rendering its judgment thereon, (Code, 91, 3493; Steed vs. Cruise et al., February term, 1883, yet published,) if, indeed, this has not been already

uthorities cited for plaintiff in error: Code, §§2951, 1, 2203; 15 Am. R., 119; 8 *Ib.*, 311; 2 *Ib.*, 39; 53 N. 25; 58 Ga., 216; Pierce, R. R. Law, 491, 492; Code 873, §2082; Wait's Actions and Def., 88 (8), 89; Code, 34, 3066, 3067, 2951, (2 and 3), 2953, 2943; 30 Ga., 247; 48 Ib., 565; Code, §\$3073, 3065, 3070; 56 N. Y., ; 54 Wis., 234.

or defendant in error: 11 Ga., 137, 140, 141; 4 Am. ., 475 (a); 1 Sutherland Dam., 158; 53 N. Y., 25; Rep., 542; 9 Am. R., 434, 435; Sutherland Dam., 749, ; 2 Am. R., 39, 42, et seq.; 8 Ib., 305, 310.

udgment affirmed.

## PRICE vs. WHITE et al.

re a defendant in fi. fa. placed in the hands of an attorney, who presented the plaintiff in f. fa., certain claims, with instructions collect them and apply the proceeds to this and another execuon, and the attorney collected the claims, but failed to settle the fa., the plaintiff, who had no notice thereof, was not bound to cognize such collection as payment to him. As to the claims so aced in his hands, the attorney represented the defendant in fi. ., and not the plaintiff.

pril 10, 1833.

ttorney and Client. Judgments. Debtor and Cred-Before Judge FAIN. Bartow county. At Chambers. ober 24, 1882.

rice filed his bill against White as plaintiff in fi. fa., nson as his attorney, and Franklin, the sheriff, for the pose of enjoining a fi. fa. in favor of White, usee, inst Hood, Johnson, complainant and others, from proling to subject the property of complainant. The bill

Price re. Whire et al.

Plaintiff in f. fa. obtained alleged, in brief, as follows: the judgment on which said ft. fa. issued on September 11, 1860, for \$106.60 principal, besides interest and costs. Shortly before, or soon after, this judgment was rendered, Price placed in the hands of Abda Johnson about \$3,000.00 worth of notes and accounts, on which the latter collected a large sum of money, to-wit, \$200.00 or \$250.00, (the exact amount of which complainant cannot state with certainty) which said Johnson told him he (Johnson) had -collected, held up and taken on said fi. fa. and one other, in favor of Brown, governor, for use of Sloan, vs. said Price et al. Abda Johnson was the attorney at law for said plaintiffs in said fi. fas., and in that capacity got the aforesaid money which he collected for complainant, who thought the fi. fa. was long ago settled. Complainant was security only in the judgment and ft. fa., and Johnson and his father were also securities. He was unable to file his affidavit of illegality, because he could not state with certainty the exact amount of money said Johnson received' on said notes and accounts.

On motion, the bill was dismissed for want of equity, and complainant excepted.

W. T. WOFFORD; C. D. McCutchen; J. M. Neel, for plaintiff in error.

GEO. S. JOHNSON, for defendant.

JACKSON, Chief Justice.

This bill was filed to stop the levy of a f. fa. in favor of White vs. the plaintiff in error, Abda Johnson and others, on the ground that Johnson was a co-surety with the plaintiff in error, and collected enough money to pay off the fi. fa. from said plaintiff, on other claims put in his hands, and failed to pay it off. The bill was dismissed for want of equity.

We are unable to see any error in it. Conceding that

#### Madden et al. vs. The State.

White on White's claim, it was for the plaintiff in error he collected it on other claims of the plaintiff in error, White had nothing to do with his breach of trust, g a stranger to the transaction. The case is covered hat of Pease vs. Dibble & Bunce, 57 Ga., 446. White no knowledge at all of any such arrangement between ison, who was attorney for plaintiff in error to collect apply those claims, and the plaintiff in error. White no party to the contract. It is not alleged that Johnacted as his agent or by his authority. He has a right ollect his debt out of any and all of the defendants, to leave them to settle equities inter seese between is selves after paying him. There was no error in dising the bill.

dgment affirmed.

MADDEN et al. vs. THE STATE OF GEORGIA.

[This case was argued at the last term, and the decision reserved.]

re, on the call of a criminal case, it was brought to the knowledge this court, by affidavit and admission of counsel, that the deidant had escaped and had not been captured or surrendered, d where no surrender or capture was shown prior to the conclun of the term of this court, the case must be dismissed.

bruary 18, 1888.

riminal Law. Practice in Supreme Court. At February Term, 1883.

eported in the decision.

J. THORNTON; W. F. WILLIAMS, for plaintiffs in error.

M. McNelll, solicitor general pro tem., for the state.

son, Chief Justice.

e counsel for the state moved to dismiss this writ of

Madden et al. vs. The State.

error, on the ground that the plaintiffs in error had escaped from jail and remained beyond the custody of the jailer and the jurisdiction of the court. They were convicted of the offence of robbery, and sentenced to twenty years imprisonment in the penitentiary, and while in jail in the county of Muscogee, pending this writ of error, they made their escape, and have not been recaptured or surrendered themselves. These facts are brought to the knowledge of this court by the affidavit of the jailer, and are admitted to be true.

In our judgment, they have thus deprived themselves of all right further to prosecute their case here. Their act is an open defiance of the law, and thereby they have deprived themselves of all legal right further to prosecute this writ of error.

Such are the adjudications of the courts of Massachusetts, Virginia, New York, Maine, and of the Supreme Court of the United States and the English courts. 97 Mass., 543; 14 Grattan, 677; 59 N. Y., 81; 31 Maine, 592; 94 U. S., 97; 17 Q. B., 503.

In an exhaustive opinion in 55th California, 290, these cases are all reviewed, and the same conclusion is reached. In some of the cases, time was allowed for submission to the jurisdiction before the cases were dismissed. Following that practice when this case was called, we allowed it to remain on this docket to the last day of the term, as long as our constitution and law for the government and jurisdiction of this court will permit; inasmuch as all cases are thereby required to be disposed of during the first term, with the exception of providential intervention.

No information or proof having reached us of the surrender of the plaintiffs in error to the jailer or authorities of the state, the law requires that the writ of error be dismissed, and it is so ordered.

Writ of error dismissed.

Miller vs. Watt & Walker

### MILLER vs. WATT & WALKER.

evendor, with full knowledge that the sale was made to a husad as agent for his wife and for her benefit, elected to give exsive credit to the agent, he could not afterwards recover from
principal; but if the vendor was ignorant of the fact that he
adealing with the agent of another, and the latter received the
ads and used them, and they were really bought for the princithough unknown to the seller when sold, such vendor may
over from the principal when this fact came to his knowledge,
augh credit was given to the agent.

objection to the admissibility of testimony must state the unds therefor; otherwise this court cannot consider an excep-

n to the ruling on such point.

ere is evidence enough to show that the goods in this case were ight for the wife's plantation and used thereon. The verdict y rest as well on circumstances which logically point to that iclusion as on direct evidence.

rch 27, 1883.

usband and Wife. Principal and Agent. Debtor and itor. Practice in Supreme Court. Before Judge as. Chattahoochee Superior Court. September Term,

att & Walker brought suit against J. W. Miller and rife, Sallie E. Miller, on an open account for groceries, Defendants pleaded the general issue. At the trial, stiffs amended their declaration by striking the name W. Miller and leaving the suit to stand against Sallie one.

goods were sold to J. W. Miller, and credit given to They had sold goods to him the year previous, and ght his account good. They did not know Mrs. Miller, lid they know where the goods went, but Miller stated e time of the purchase that they were bought for his in Stewart county. He did not disclose that he agent for Mrs. Miller. He was to obtain the money a warehouse and pay for the goods in thirty days,

#### Miller re. W.tt & Walker.

or, in default thereof, he was to pay credit prices. I paid in thirty days, plaintiffs expected payment t made out of the farms and crops in Stewart county. It thought the farms belonged to Miller until payment pressed, and he then declared that he owned not He had been conducting the farming operations for Miller, and acted as her agent.

Mrs. Miller denied that she owed the account, or she had bought the goods or authorized any one elbuy them for her. She admitted, however, that her band had superintended her business, and acted as agent in connection with her farms.

The jury found for the plaintiffs. Defendant me for a new trial, on the following among other grounds

- (1.) Because the verdict is contrary to law and dence.
- (2.) Because the court admitted interrogatories of defendant taken in another case.
- (3.) Because the court charged, in effect, that is agent buys goods without disclosing his agency, and vendor subsequently discovers it, he may elect to put the agent or person for whom he acted.

The motion was overruled and defendant excepted.

- J. E. D. SHIPP; THORNTON & HARGETT, for plainti error.
- T. D. HIGHTOWER; PEABODY & BRANNON, for defende

JACKSON, Chief Justice.

This suit was brought originally against husband wife. The husband's name was stricken, and the suit ceeded against Mrs. Miller alone. It was founded to open account for goods sold, and a verdict was returned the plaintiff's for the amount of the account. Where Mrs. Miller moved for a new trial; and error is assistant on the denial of that motion.

Miller es. Watt & Walker.

The credit was given to the husband, but without vledge, on the part of plaintiff, that the goods were for plantation of the wife. The proof is that the husband d as agent of the wife in her business in respect to the tation; that he did supply her plantation; that he had of his own; and the conclusion seems pretty clear these goods bought by him were those he furnished as her agent, and bought for her. If the plaintiff had vn that the purchase was for the wife's place, and that husband was buying as her agent, and with this wledge had elected to give the exclusive credit to the t, then the law is that he could not recover from the cipal; but if he were ignorant of the fact that he was ing with the agent of another, and that other got the s and used them, and they were really bought for principal, though unknown to the seller when sold. seller might recover from the principal when this fact e to his knowledge, though the credit was given to the Wylly et al. vs. Collins & Company, 9 Ga., 223. ıt. n page 239 (10th division) Judge Nisbet, in delivering opinion of the court, says: "If an agent buy in his name, without disclosing his principal, and the seller equently discover that the purchase was in fact made nother, he may, at his choice, look for payment either ne agent or the principal, and that too, notwithstandthe title has been made to the agent, and he debited the account. \* \* \* On the other hand, if at the of the sale, the seller knows, not only the person who ominally dealing with him is not principal but agent, also knows who the principal really is, and, notwithding all the knowledge, chooses to make the agent his or, dealing with him and him alone, the seller must be n to have abandoned his recourse against the princiand cannot afterwards, upon failure of the agent, turn d and charge the principal, having once made his ion at the time when he had the power of choosbetween the one and the other." Citing 3 Douglass,

The Western and Atlantic Railroad vs. Carson

410, and note; 4 Taunt, 574; 15 East., 62; 9 B. & C., 7 Wash. C. C. R., 567. And then the court there go cay: "An election deliberately made, with knowledge facts and absence of fraud, is conclusive; and the p who has once elected, can claim no right to make a sechoice, and there is no difference in this respect between the rules pursued by courts of law and equity. We have seen that the bare circumstance of having chat the goods to him (the agent) on the books, does not

That case rules and controls this. In that, it was so to charge a trust estate, and not only was the agentrustee charged and debited with the goods, but his vidual promissory note was taken in liquidation of debt, yet the trust estate was held liable.

- 2. It has been repeatedly ruled that objection to admissibility of testimony must state the grounds the for; therefore the point in regard to the admissibility interrogatories taken in another case, is not before us.
- 3. There is evidence enough to show that the g were bought for the wife's plantation, and used ther The verdict may rest as well on circumstances which cally point to that conclusion as on direct evidence.

Judgment affirmed.

stitute such an election."

# THE WESTERN AND ATLANTIC RAILROAD vs. CARSON

- Where a verdict on an appeal case in a justice's court was dered October 12th, 1830, and a petition for certiorari was file January 12th, 1831, it was not in time, and was properly disminant from the verdict of the jury in appeal cases in a justice.
- 2. It is from the verdict of the jury in appeal cases in a just court that a certiorari may be taken, not from the judgment we the justice may enter thereon. Therefore, the certiorari must allowed and brought within three months from the date of verdict; and it is not sufficient that it is within three months the entry of the judgment by the justice.

April 3, 1883.

The Wes ern and Atlantic Bailroad iv. Carson.

ntute of Limitations. Justice Courts. *Certiorari*. re Judge Fain. Bartow Superior Court. July Term,

erson sued the Western and Atlantic Railroad, in a ce's court, and the case was appealed to a jury therein. October 12th, 1880, a verdict was rendered for the stiff for ten dollars. On October 13th, 1880, judgment signed up by the plaintiff's attorneys, upon this ver-

The defendant, being dissatisfied, petitioned for obtained the writ of certiorari, which issued January 1881; and the petition, writ, affidavit, bond, etc., all filed in office on January 12th, 1881. When the crari came on for trial, the defendant therein (plain-below) moved the court to dismiss the same, on the nd that it was not brought within three months the rendition of the verdict in the justice's court. court sustained this motion, and dismissed the certiri, and plaintiffs in certiorari excepted.

KIN & AKIN, for plaintiff in error.

M. NEEL, for defendant.

sox. Chief Justice.

The writ of certiorari was not sued out in time, unhe ruling in 60 Ga., 632. In that case, judgment was ered on June 12th, and the petition was filed on Sepher 12th. It was held too late, being not within three ths, the three months expiring at 12 o'clock on the 11th exptember. In this case, the verdict was returned on 2th of October, 1880, and the petition filed on the 12th anuary, 1881. The cases on the point are identical. in the 60th Ga., controls this.

But it is said that the judgment was not signed on verdict, in the case at bar, until the 13th of October. does not alter the case. The certiorari is to correct

Wellborn vs. Estes.

the verdict, and from the verdict it carried this case to superior court. Code, §4157 (j).

The judgment may not have been signed in a most shall the party have four months after trial to certion the case? We think not. But the statute is conclusted in the conclustion of the case, in Code, §4157 (j), that "When either particle dissatisfied with the verdict of a jury in any appeal tried in the justice courts, such party may apply for and tain a writ of certiorari," etc. It is upon the verdict on appropriate of the peace that he applies for the writ of tiorari, not upon the judgment of the justice of the por any other judgment. The writ was properly dismiss Judgment affirmed.

## WELLBORN vs. Estes.

[This case was brought forward from the last term, under §4271 (a) of the Coo

- Legislative acts in violation of the constitution of this state of the United States are void; and it is the duty of the judiciar to declare them; but before an act of a co-ordinate department the government will be declared unconstitutional, the conflict tween that act and the fundamental laws must be clear and paper.
- 2. The object of construction, as applied to a written constitution to give effect to the intention of the people in adopting it, an determine the thought which the constitution expresses, whole instrument should be examined, with a view to arriving the true intention of each part, and effect should be given, if sible, to every part.
- (a.) The practical exposition of the government itself, in its var departments, furnishes a collateral means of interpretation.3. Construing the different provisions of the constitution of 187
- as to give effect to each in respect to the elections and term office of judges of the superior court, the purpose of that ins ment was as follows: to give each judge of the superior court th after to be elected an official term of four years, provided he chosen as the successor of one who was an incumbent at the to f the election; that the judges should be so classified as to be on the election of one-half of the number (as nearly as might at each regular biennial session of the general assembly; that

#### Wellborn vs. Estes.

erm of each one, so elected at the close of the full term of his redecessor, should commence on the first day of January next hereafter; that a vacancy in office from any cause should be filled y appointment of the governor until the convening of the general seembly; that upon their convening they should fill, by election, he unexpired portion of the vacant term.

Where a new judicial circuit was created at a prolonged session of the general assembly, held in an intermediate year between the ears for the regular biennial session, it was the duty of the legisature to assign the judgeship to one of the classes fixed by the constitution, and the time between the creation of the office and the regular election of the class of judges to which it was assigned eccupied the position of a vacancy to be filled by the general asembly.

Therefore a provision in the act creating such office, "that a udge shall be elected by the general assembly at the present sesion to hold office until the next regular election for half the judicial circuits already established, and until the time fixed by law, after said election, when the terms of said judges expire," was not unconstitutional.

t is not decided whether these are legislative or judicial questions, but that the unconstitutionality of the act has not been made apparent.

March 13, 1883.

Constitutional Law. Judges. Courts. Before Judge RRIS. Hall county. At Chambers. January 27, 1883.

Carlton J. Wellborn filed his petition for leave to file information in the nature of a quo warranto against in B. Estes. The petition alleged, in brief, as follows: August 8, 1881, the legislature passed an act creating Northeastern Judicial Circuit. On August 11, Wellow was regularly elected judge of the circuit, and was missioned on the following day. The commission, ich was attached as an exhibit to the petition, provided it is should "remain in force until the first day of Janery, 1883, and until your successor is elected and qualid in the mode pointed out by the constitution and laws this state." By the second section of the act creating a circuit it was provided that the judge first elected buld hold his office until January 1, 1883. Under his

election, Wellborn proceeded to perform the duties and enjoy the emoluments of the office. On November 21, 1882, the general assembly proceeded to vote for a judge for said circuit, to hold office from January 1, 1883, for the term of four years. At this election, Estes received a majority of the votes cast, was declared elected, was commissioned, and, since January 1, 1883, has proceeded to act as judge. The petitioner insists that the second section of the act of 1881, limiting the term of the first incumbent, was unconstitutional, that the election thereunder was of no effect, and that the acts of Estes as judge amounted to a usurpation of petitioner's rights.

A rule nisi was issued, calling on Estes to show cause why an information in the nature of a quo warranto should not be filed.

Respondent demurred to the petition, and for cause why the information should not be filed, showed as follows: By the act of August 8, 1881, the Northeastern Circuit was created, and it was provided that a judge should be elected at the pending session of the legislature, to hold office until the next regular election of judges for half the judicial circuits already established, and until the time fixed by law. after said election, when the terms of said judges should expire; and that at said next regular election a judge should be elected for the full term, who should hold office as the other judges then elected for existing circuits; and that thereafter a successor of the judge so elected should be elected as provided by the constitution and laws. In pursuance of a joint resolution of the legislature to elect a judge for the term prescribed in the act, Wellborn was elected and commissioned. He accepted this commission, and under it acted as judge. On November 21, 1882, the general assembly proceeded to elect a judge for the full Petitioner and respondent were both candidates, and both received votes, but respondent receiving a majority, was declared elected for the full term of four years, was duly commissioned, and has, since January 1, 1883,

eted as judge thereunder. Both parties were eligible to ection.

The hearing was had at chambers, January 27, 1883. he prayer of the petitioner was refused, and the petitioner accepted.

In support of their position, counsel for plaintiff in error cited the following authorities: On term of office, onst. 1877, section 3, par. 1-2; 1 McCord, 154-5; 37 al., 614; 12 Id., 391. Not a vacancy, Const., art. 6, ec. 3, par. 2-3; 54 Ga., 391; 44 Ga., 76. Election 1882 invalid, 5 Wend., 423; 11 Cal., 77, 88; 12 Id., 78. Creation of circuit valid, fixing the term invalid, McCord, 155; 2 Wend., 266; 11 Id., 132; 12 Cal., 378.

McCord, 155; 2 Wend., 256; 11 It., 132; 12 Cal., 378. ot a political question, 2 Ala., 31; 1 Id., 688; 12 Cal., 78; 42 Ga., 405; 62 Pa., 343; 3 Snead, 6. Cited by defendant in error: Judges classified, Const.,

868, art. 5, sec. 3, par. 1; 54 Ga., 393; Convention proceedings, 1877, pp. 163, 232; Const., 1877, art. 6, sec. 7, ar. 2; Ordinance, Code, p. 1328; Acts, 1881, p. 12. Va-

ney, 44 Ga., 76; 49 Id., 115; Acts, 1855–6, p. 216; Pa. St., 419; 7 Ind., 329; 8 Id., 350; 5 Nev., 111; 6

ow. (Miss.), 601; 1 Opinions att'y gen'l, 631; 2 Id., 525; Id., 673; 14 Id., 2. Political question, 41 Ga., 161;

Howard, 43; 13 Wallace, 649; 6 Id., 50.

E. N. BROYLES; F. L. HARALSON; R. J. McCAMY. 10rd aintiff in error.

HOPKINS & GLENN; DUNLAP & THOMPSON, for defendant

ALL, Justice.

The sole question made in this case is, whether the period of section 2 of the act of the general appearance.

e words following: "That a judge Sha! .....

e general assembly at the present women is and office atil the next regular election for half the process of the second s

already established, and until the time fixed by law, said election, when the terms of said judges expire, forms to that provision of the constitution fixing the of office at four years, and until his successor is qua Art. vi., §3, par. 1, constitution of 1877 (Code, §5136) to other provisions of that instrument, relating to the subject, especially par. 2 and 3 of the same article section (Code, \$\$5137, 5138), which are as follows: successors to the present incumbents shall be elected the general assembly, as follows: to the half (as ne may be) whose commissions are the oldest, in the 1878; and to the others, in the year 1880. All subset elections shall be at the session of the general asse next preceding the expiration of the terms of incum! except elections to fill vacancies. The day of election be fixed by the general assembly."

"The terms of the judges to be elected under the stitution (except to fill vacancies), shall begin on the day of January after their elections. But if the time the meeting of the general assembly shall be changed general assembly may change the time when the ter judges thereafter elected shall begin."

By section 12, par. 1, of the same article, it is prothat, "The judges of the superior court" (among officers named) "shall be elected by the general asserting joint session, on such day or days as shall be fixed by resolution of both houses. At the session of the general assembly which is held next before the expiration of terms of the present incumbents, as provided in this stitution, their successors shall be chosen; and the shall apply to the election of those who succeed to Vacancies occasioned by death, resignation, or cause, shall be filled by appointment of the governor, the general assembly shall convene, when an election be held to fill the unexpired portion of the vacant to Code, §5161.

By an ordinance of the convention which framed

stitution, it was declared that, "There shall be sixteen icial circuits in this state, and it shall be the duty of general assembly to organize and proportion the same such manner as to equalize the business and labor of judges in said several circuits, as far as may be practible. But the general assembly shall have power here or to re-organize, increase, or diminish the number of cuits; provided, however, that the circuits shall remain now organized until changed by law." Code, 1882, 1328.

The act of the 8th of August, 1881, organizing and created this judicial circuit, after fixing the term of the first ge elected and commissioned under it, further provides t, after his term expires, "at the next regular election udges for the circuits of the state, a judge for said northern circuit shall be elected for the full term, who shall d office as the other judges then elected for the other sting circuits, and his successors shall be thereafter eted as provided by the constitution and laws." Acts 10-1, p. 113.

The plaintiff in error, who was the first judge elected ler the act creating the circuit, and who was commisned in pursuance of the act, to hold his office from the e of his election in August, 1881, until the first day of nuary, 1883, contends that so much of the act as limited official term to that date, and provided for the election l qualification of his successor at the session of the genl assembly next preceding that period, was repugnt to the above recited provisions of the constitution of the ordinance of the convention that framed the stitution; and that the requirements thereof could only re been complied with by extending his term to the t day of January, 1885; that his successor could not re been legally elected, except at the session of the eral assembly next preceding this date, viz.: at the sion of 1884; and that, inasmuch as his office was created the constitution, and the term thereof was fixed by the

same instrument, it continues, notwithstanding the tion of the defendant in error as his successor, by the sion of the general assembly of 1882, under the provi of the act, and his commission and qualification by governor, in pursuance of said election.

In determining questions of such moment and del

as those here presented, we feel bound to proceed great caution, and not to set aside the action of a co

nate department of the government, except where conflict between that action and the fundamental l clear and palpable. It must be so apparent as to lea reasonable doubt as to its existence, upon the jud We hold, with an eminent judge and learned mentator, that "constitutions are not designed for a physical or logical subtleties, for niceties of expression critical propriety, for elaborate shades of meaning, of the exercise of philosophical acuteness or judicia search. They are instruments of a practical nature, fou on the common business of human life, adapted to mon wants, designed for common use, and fitted for The people make them, the pe mon understandings. adopt them, the people must be supposed to read t with the help of common sense, and cannot be pres to admit in them any recondite meaning or any exdinary gloss." 1 Story's Com., §451. Hence result rule that "every word employed in them is to b pounded in its plain, obvious and common sense, u something else in them furnishes ground to control, ify or enlarge it." Ib. "The familiar rule," says Sha C. J., in Smith vs. Halfacre (6 Howard, Miss. R., "that all instruments must be construed according t sense of the terms used, and the intention of the part as applicable to constitutions as anything else; perha is more so, as a constitution is but a general form of

ernment, the details being left to legislation. One of primary objects of a constitution is a harmonious order the operations of the several departments of the go

, and where the instrument is doubtful, or not suffily specific in its provisions, we may safely conclude it was not the intention of the framers to produce disand confusion.

Te must, in the next place, look to 'the scope and deof the instrument, viewed as a whole, and also viewed component parts.' If the design and object be clear, ugh the provisions may seem to be doubtful, we have e guide to a proper construction.

Where a constitution is not entirely explicit in itself, requires construction, it ought not to be so construed cripple the government and render it unequal to the its for which it is declared to be instituted." Citing 9 at. R., 1.

e object of construction, as applied to a written contion, is to give effect to the intent of the people in ting it. "The thing which we are to seek is the thought in the constitution expresses. "The whole instrument be examined with a view to arriving at the true intent of each part. In comparing one part of the instruwith another," it is not to be supposed that any words been employed without occasion, or without intent they should have effect as part of the law. The rule cable here is, that effect is to be given, if possible, to whole instrument and to every section and clause. If the portions seem to conflict, the courts must harmothem, if practicable, and must lean in favor of a contion which will render every word operative, rather one which makes some idle and nugatory.

e rule is applicable, with special force, to written conions, in which the people will be presumed to have essed themselves in careful and measured terms, cornding with the immense importance of the powers ated, leaving as little as possible to implication. It creely conceivable that a case can arise where a court d be justifiable in declaring any portion of a written itution nugatory because of ambiguity. One part

may qualify another so as to restrict its operati

apply it otherwise than the natural construction require, if it stood by itself; but one part is not to lowed to defeat another, if, by any reasonable constr the two can be made to stand together." Cooley Cons marg. pp. 55, 56, 57, 58. Says Marshall, Ch. J., (G vs. Ogden, 9 Wheat., 188), "The framers of the co tion, and the people who adopted it, must be under to have employed words in their natural sense, and t understood what they meant." "This," remarks Cooley (Const. Lim., p. 58 marg.). "is but saying t forced or unnatural construction is to be put upor language, and it seems so obvious a truism that of pects to see it universally accepted without questio the attempt is made so often by interested subtle ingenious refinement to induce courts to force from instruments a meaning which their framers never that it frequently becomes necessary to redeclar fundamental maxim. Narrow and technical reason misplaced when it is brought to bear upon an instr framed by the people themselves, for themselves, a signed as a chart upon which every man, learned as learned, may be able to trace the leading principles of ernment."

So solicitous have the courts been to avoid every that even looks like thwarting a portion, however of the sovereign will, as embodied in this fundar law, that they have not only called to their aid in tions from the instrument itself, but have even gon side of the constitution to find reasons for avoiding they have availed themselves not only of the process of the convention which framed it, but have soughthe practice of other departments of the government paid great deference to their action, and especially action and opinions of those who were cotemporal with it, which would seem to have peculiar claims regard upon the question under discussion, because the sought that they are they are they are the sought that they are the sought that they are they are they are they are they are the sought that they are the

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# SUPREME COURT OF GEORGIA.

### Wellborn re. Estes.

attention of every department of the government was thus solemnly called to them, the executive issued a commission and qualified the person chosen by this second election under the act. Nor are these the only instances of such action upon the part of the legislative and executive departments of the government of the state upon similar provisions contained in former constitutions; or of the other states, and of the general government, as was abundantly shown in the able and exhaustive opinion of McCay, J., who spoke for the majority of this court in Gormley vs. Taylor, 44 Ga., 76, and again affirmed by a majority of the court in Holtzclaw vs. Russ, 49 Ga. 115; Trippe, J., speaking for the court in that case.

But expounding the constitution by its own terms, and giving full effect to each of the provisions above set forth, it is manifest that the purpose of that instrument was to give to each judge of the superior courts thereafter to be elected:

1st. An official term of four years, provided he was chosen as the successor of one who was an incumbent at the time of the election.

2d. That the judges were to be so classified as to bring on the election of one-half of the number, as near as might be, at each regular biennial session of the general assembly.

3d. That the term of each one so elected, at the close of the full term of his predecessor, should commence on the first day of January next thereafter.

4th. In case of a vacancy in the office, from any cause, it was to be filled by appointments of the governor, to last until the general assembly should convene.

5th. When the general assembly should so convene, they were required to fill, by election, the unexpired portion of the vacant term.

This circuit was created at a prolonged session of the general assembly, held in a different year from that when the body is regularly convened on the day fixed by law

ts biennial session. The election was held at a differtime, and in a different year, from that contemplated he constitution for the holding of elections for full is, or the filling of the unexpired portions of such as become vacant. To one or the other of these classes, general assembly was compelled to assign this judge-; it was as competent to select the 1st day of January. s, for the commencement of the full term, as to make egin on the 1st day of January, 1885, and to bring on election at the session of 1882, as at that of 1884. In her event could the judge first elected have more than remnant of a full term, and it is unimportant, in a legal constitutional sense, whether that remnant covered than two or four years, as was necessarily the case in instance.

hat it was the purpose of the convention that framed constitution to make this classification the policy of state, is evident from the debates and proceedings of body. Mr. Hammond, a delegate from Fulton county, ressing himself to this subject, said: "I desire to make mendment of this paragraph, which reads, 'that the essors of the present incumbents shall be elected by general assembly, as their terms expire, beginning in D.' The paragraph, as it stands, makes all of the judges solicitors come before the legislature at the same time. general assembly, in 1881, would elect all these ers, and the general assemby of 1883, would elect none. he meantime you will have a new governor and a new eral assembly, but nothing new as to the judiciary. nakes the machinery of the state work unevenly. k we should bring on the election of one-half of e judges during each executive term. The governor ls for two, and they hold for four years. In order that one of these legislatures may equal each other in er, I move this amendment as a substitute for par. 3, My amendment is, 'the successors of the present in-

cumbents shall be elected by the general assembly as follows: the half, as near as may be, whose commissions will soonest expire, shall be elected in the year —— and the others in the year——. All subsequent elections shall be upon the expiration of the terms of the incumbents, except elections to fill vacancies. The days of elections may be fixed by the general assembly.' I will remark that the reason I did not fill the blanks is because I did not know the wishes of the convention to fix the removals."

He then moved to insert in the blanks "1880 and 1882." Mr. Brown moved to insert "1878 and 1880." This motion finally prevailed. Before it was put, however, Mr. Matthews asked if that would not prolong the terms of some of the judges? To which Mr. Hammond responded, "I understand it would prolong the term of one of them a few months."

Mr. Matthews: "Would it not prolong the term of two of them at least?"

Mr. Hammond: "I was after fixing the date, without regard to men."

Mr. Nisbett: "Wouldn't the gentleman now accept unless their terms sooner expire,' as an amendment?"

Mr. Hammond: "I have no objection to receiving the idea, but the language is not such as I would use. I will amend by saying: 'In case the terms sooner expire, the governor shall fill them by appointment, until the day of their election arrives.'" As thus amended, this paragraph was adopted without a division. Proceedings of Convention, 1877, pp. 232, 233.

But, apart from this, there cannot be a doubt, from the language of the constitution, that each legislature was to fill the terms of half the judges (as near as might be) by election, and that each of these full terms was to commence on the first day of January next after the election; and that this time for the commencement of such terms should continue so fixed unless "the meeting of the general assembly should be changed," in which event, that body

the change the time when the terms of judges to be reafter elected should begin. Const., art. 6, §3, par. 2. ther this paragraph nor the one succeeding is applicable terms that commence irregularly; these should be sted as vacancies, which are expressly excepted from operation of these clauses, and are specifically provided in the last clause of par. 1, §12 of the same article, ch provides that vacancies occasioned by death, resignon or other cause, shall be filled by appointment of governor, until the general assembly shall convene, en an election shall be held to fill the unexpired portion the vacant terms.

he only interpretation we can put upon these several visions of the constitution, which will harmonize them give effect tó all and every part of them, and preserve act the policy which they establish, is to treat this office vacancy as soon as it was created, and then to fill it election of the general assembly. We do not deem it all doubtful that the leading purposes of the constituwas to have these terms expire at different times, so t one-half of them, as nearly as practicable, would be plied by each legislature that assembled; that they uld commence on the day named, and that there should a full term assigned to each one elected, save only in case of a vacancy. But if it were doubtful, then, under rule of construction above set forth, it should be our pose so to interpret it as to give effect, if possible, to whole instrument and to its every section and clause. portions seem to conflct, we should, if practicable, harnize them, and we must lean to that construction which I bring about this result; for, we repeat that it is rcely conceivable that a case can arise where a court ald be justifiable in declaring any portion of a written stitution nugatory because of ambiguity, or so treatit as to render any word there "inoperative," or "idle" "nugatory." We only adopt rules which have obtained all other courts, who have dealt with these questions,

under constitutions containing such provisions as our own. The numerous cases upon the question will be found in the brief furnished by the eminent counsel for the defendant in error which appears in the reporter's statement; while the assiduity and learning of the plaintiff's counsel have resulted in finding no case to the contrary, and our own careful investigation and extensive research, has enabled us to discover nothing adverse to the result we have been compelled to reach, because, as we believe, no such thing exists, either in text books of authority or the decision of courts.

We do not propose to enter upon the discussion of the much mooted and stubbornly contested point of whether these are legislative or judicial questions, but content ourselves with quoting the explicit terms of our constitution: "That legislative acts in violation of this constitution or the constitution of the United States are void, and the judiciary shall so declare them" (Code, \$5028), with the qualification that this "violation" must be clear and unequivocal. In the clear and forcible language of Judge Story, (more strictly applicable to the state than the Federal constitution), it should be constantly borne in mind, that "the most important rule in cases of this nature is, that a constitution of government does not and cannot, from its nature, depend in any great degree upon mere verbal criticism, or upon the import of single words. Such criticism may not be wholly without use; it may sometimes illustrate or unfold the appropriate sense; but unless it stand well with the context and subject-matter, it must yield to the latter. While, then, we may well resort to the meaning of single words to assist our inquiries, we should never forget that it is an instrument of government we are to construe; and, as has been already siated, that must be the truest exposition which best harmonizes with its design, its objects, and general structure.

"The remark of Mr. Burke may, with a very slight change of phrase, be addressed as an admonition to all those who

Williams, relator, vs. Clarke, judge.

called upon to frame or to interpret a constitution. vernment is a practical thing, made for the happiness of nkind, and not to furnish out a spectacle of uniformity gratify the schemes of visionary politicians. The busies of those who are called upon to administer it is to e and not to wrangle. It would be a poor compension that one had triumphed in a dispute, while we had an empire; that we had frittered down a power, and the same time had destroyed the republic." 1 Story's m., §§455, 456.

udgment affirmed.

WILLIAMS, relator, vs. CLARKE, judge.

his case was brought forward from the last term, under £4271 (a) of the Code

Caches of counsel in perfecting service of a bill of exceptions coners no right upon his client to have a second bill.

The law allows but ten days for service of a bill of exceptions, and makes no difference on account of the fact that some of the defendants in error reside in other counties than that of the venue of the suit. Non-residence of parties and absence of counsel from some are provided for by allowing service on counsel by leaving a copy at his house. No excuse is made for not so serving in this case.

This court will always reluctantly issue a mandamus nisi to the udge of the superior court, requiring him to show cause why he hould not sign and certify a second bill of exceptions in the case and on the same points as the first. It will never do so, unless liligence be shown in respect to the first, and the case is exceptional by reason of providential intervention, or some other reason qually strong.

February 20, 1883.

Practice in Supreme Court. At February Term, 1883.

On January 20, 1883, during a regular term of Terrell perior court, John Williams moved to be allowed to file perions pendente lite in the case of Jones, administrates. Vs. Bartlett et al. Petitioner alleged that the case

Williams, relator, vs. Clarke, judge.

had been tried at the May term, 1882, of such court; the adjournment of court, he had excepted and ried the case to the Supreme Court, where it was dismiss as prematurely brought.

The presiding judge refused the motion to file extions pendente lite on this showing, and movant excep The bill of exceptions was certified and handed to cou for plaintiff in error (Hon. D. A. Vason, who live Albany), on January 23, the day of the decision. petitioner, who lives in Schley county, states that this of exceptions did not reach him until nine days after was certified, and then, by reason of the fact that the fendants in error lived a long distance apart, and in di ent counties, it was impossible to serve them in a This bill of exceptions was never filed, and no service perfected. Accordingly a second bill of exceptions prepared and presented to the judge on February 12, 1 (still within thirty days from the decision complained The judge refused to sign it, on the ground that he already signed one bill of exceptions to the same ru Thereupon a mandamus nisi is asked.

W. A. HAWKINS, for relator.

No appearance for defendant.

JACKSON, Chief Justice.

The mandamus nisi is denied. The plaintiff's cour is in laches, or at fault, in the language of our Code. vice could have been made of the first bill of excep by him on counsel on the other side, and no reas given why it was not done, or even that the counsel clined to acknowledge service. Code, §4258.

The fact that defendant himself did not receive the of exceptions until nine days after it was signed, carelieve the *laches* of the counsel who received it or day it was signed and certified. The fact that the defendance of the counsel who received it or day it was signed and certified.

Singleton vs. Holmes et al., commissioners.

s to the bill of exceptions resided in different counties. l could not be as readily served, does not alter the case. e law allows but ten days for service, and makes no disction, as respects time of service, between cases where re is one or a number of defendants, or between cases ere all the defendants reside in the county of the venue. some of them in other counties. The statute provides non-residence of defendant and absence from home of counsel, by authorizing service on the attorney by ving a copy of the bill of exceptions at his residence. excuse is made that this was not done. Code, §4259. This court will always and in all cases reluctantly issue nandamus nisi to the judge of the superior court to w cause why he did not sign and certify a second bill exceptions in the same case on the same points; it will ver do so unless diligence be shown in respect to the t, and the case is exceptional by reason of providential ervention, or some other reason equally strong. In this e, there is laches and no good reason at all for the essity of a second bill of exceptions.

Mandamus nisi denied.

SINGLETON vs. Holmes et al., commissioners.

ere one refused to work the public roads, after being duly notified to do, and on failing to give any excuse therefor, he was fined by he road commissioners, and in default of payment thereof, was imprisoned, such imprisonment was under a lawful warrant, and here was no error in refusing to discharge the prisoner, under a writ of habeas corpus.

April 3, 1883.

Roads and Bridges. County Matters. Habeas Corpus. Fore Judge Stewart. Spalding Superior Court. August m, 1882.

Reported in the decision.

HENRY WALKER, by brief, for plaintiff in error.

Singleton rs. Holmes et al., commissioners.

E. Womack, solicitor general, for the defendants.

The plaintiff in error, having been duly summone

CRAWFORD, Justice.

work on the public road in the 540th district of Pike confailed and refused to comply with the said summon required by law. He was then duly notified to appear fore the road commissioners and render his excuse, if he had, why he did not obey the summons to work or said public road. This notice he also refused to obey. commissioners, thereupon, issued their warrant for he rest, as authorized by the act of 1865–6. and had brought before them, to be dealt with as the law did After hearing the evidence in the case, they ordered adjudged that he pay a fine of three dollars and fifty cents, or in default thereof, that he be imprisoned for space of eight days. Having failed to pay, he was prisoned.

He sued out a writ of habeas corpus, alleging the was illegally detained, because the warrant of the commissioners had been issued and executed upon unsupported by affidavit.

Upon the hearing of the writ of habeas corpus, the refused to discharge the prisoner, because he had imprisoned under lawful process, and remanded him custody of the officer. This ruling is assigned as Seeing no error, and none being shown, the judgment affirmed. Code, §§619, 627.

Judgment affirmed.

King rs. Phillips.

### KING vs. PHILLIPS.

There one was sued and served in Georgia, and judgment was endered against him, a motion to set aside such judgment, on the ground that the suit was brought and service was perfected pon him whilst he was in attendance upon court, under a requition from the governor of Georgia on the governor of Florida, by intue of which he was forced to return to Georgia for trial, and that he did not appear and plead to the merits nor authorize any me to do so for him, was not sustained by showing merely the equisition and arrest in Florida, without any custody of him by my officer of this state. His presence will be presumed to have seen voluntary, in the absence of proof to the contrary.

Vere these facts sufficient to sustain a plea of want of jurisdiction f the person of defendant, having been served and failed to plead to the jurisdiction, he will be concluded by the judgment.

farch 20, 1888.

urisdiction. Extradition. Judgment. Before Judge NSELL. Brooks Superior Court. November Term, 1882.

Reported in the decision.

V. C. McCALL, for plaintiff in error.

G. McCall, for defendant.

AWFORD, Justice.

The plaintiff in error filed his petition in the superior art of Brooks county to set aside a verdict and judgment dered against him, upon the ground that the suit was ought and service perfected upon him whilst he was in endance upon the said court, under and by virtue of a misition made by the governor of Georgia upon the governor of Florida for him, as a fugitive from justice, and ced to return to the said county of Brooks to answer a criminal charge made against him. He further alleged the did not appear or plead to the said suit, nor did he thorize any other person to do so in his behalf.

ssue was joined on the facts set out in the petition,

King vs. Phillips

tried by a jury, and found in favor of the defendant in the motion. The movant submitted a motion for a new trial, because the verdict was contrary to law and contrary to evidence; and because the judge erred in charging the jury, among other things, that, to find for the movant, it was necessary for him to show that he was delivered to the agent of the state of Georgia, or that he was actually arrested by the sheriff or other officer of this state, or was a prisoner when he was served.

1. Upon an examination of the record in this case, we do not see that the verdict is contrary to law or contrary to evidence.

That there was a requisition made for him appears by the executive warrant, issued by the governor of Florida for his arrest, and that he was arrested, he himself testifies; but there is no return thereof made by the sheriff on the warrant, nor does it appear that any further action was ever had thereon, or that he was ever under arrest or in the custody of any officer of the state of Georgia. So that there was no extradition of him, in legal contemplation. His presence was not compelled, under the constitution and laws provided for that purpose, and must, therefore, be presumed to have been voluntary, unless it had been made to appear otherwise. He was, if here not as a prisoner, or under compulsion as a fugitive from justice, liable to suit as others are, and must answer thereto in like manner.

2. In so far as the remaining ground of error is concerned, we say that, whether the charge of the judge was right or wrong on the point complained of, it cannot affect or change the finding of the jury, because, if all that the movant sets out in his position be true, to avail himself of the privilege which he now claims, he should have appeared and pleaded it then by way of defence to the original suit. Having been served, he should not have neglected the defences which the law gave him, until after final judgment had been rendered, and then move to set the

Citizens' Bank of Georgia rs. Hubbard.

e aside. He shows by his petition that he did not l himself of his privilege at the proper time, if, indeed, were entitled, under the facts of the case, to plead the e as against the plaintiff's right of action.

The denied the jurisdiction of the court to proceed inst him in the suit which resulted in the Judgment complained of, he should have appeared and pleaded reto, at the proper time; otherwise, he is concluded.

ee the case of Duncombe vs. Church, 1 Salk. Rep., p. 1; e, §3456; 17 Ga., 573; 27 Ib., 172; 61 Ib., 208; Code, 62.

udgment affirmed.

# CITIZENS' BANK OF GEORGIA vs. HUBBARD.

case was argued at the last term, and the decision reserved. Jackson, Chief Jus ice, being disqualified, did not preside ]

'hat a portion of the creditors of an insolvent debtor have filed a reditors' bill for themselves and such as may choose to come in and be made parties thereto, and that under such bill the effects of the debtor have been placed in the hands of a receiver, does not preclude other creditors from proceeding to obtain judgments against the debtor.

That one of the creditors of the defendant in the equity suit oined with the other creditors to have their interest represented in such suit, and petitioned the receivers appointed to select experts to examine into the books of the debtor, and that the receivers paid to the attorneys of the creditors certain fees for services rendered in the equity suit, did not, without more, make such creditors a party to the equity suit; certainly not in such sense as to prevent his bringing an action against the debtor or to require him to elect between the two cases. He is not an actual party to an equity case until he has been made so in some way known to the aw.

February 20, 1883.

Actions. Lis pendens. Debtor and Creditor. Received Before Judge CLARK. City Court of Atlanta. Denber Term, 1881.

Citizens' Bank of Georgia rs. Hubbard.

Reported in the decision.

JULIUS L. BROWN; M. A. CANDLER, for plaintiff in error.

HOPKINS & GLENN; L. E. BLECKLEY; HARRISON & PRE-PLES, for defendant.

CRAWFORD, Justice.

The defendant in error brought suit against the plaintiff in error in the court below, to recover the sum of \$892.31. To this suit the defendant pleaded the general issue, and a special plea setting forth, substantially, that the defendant had made an assignment of all its effects for the benefit of its creditors; that the assignees, under a creditors' bill, had been appointed receivers, and had taken possession of all the effects of the said defendant; that the said bill was still pending, and the plaintiff should not be allowed to maintain this suit, whilst the said equity suit was also pending, and its property in the hands of the receivers. To this plea an amendment was filed, averring that the plaintiff and other creditors of the defendant held various meetings and employed counsel to represent their interest in said equity suit, and took an active interest in the cause so pending, and moved for and obtained orders in relation thereto; that the said plaintiff was reported by the receivers as a creditor; that the said attorneys petitioned the receivers to appoint experts to ascertain and report the true condition of the bank as shown by its books; that the said receivers paid to said attorneys \$1.200 for services rendered and to be rendered in the said equity suit. The special plea of the defendant, as amended, was stricken on demurrer, and that is the error which brings the case to this court.

That the judgment of the court below was correct is to our minds most manifest. Even if we were to reverse the rule as to the construction of pleadings, and construe the averments in the plea of the defendant most strongly in Citizens' Bank of Georgia vs. Hubbard.

favor, we could find nothing which would make the aintiff a party to the bill in equity now pending against e defendant in Fulton superior court.

To hold that a common law judgment could not be ob-

ned against a defendant because, under a creditors' bill, e effects of the defendant had been placed in the hands a receiver for the benefit of his creditors, would be to ablish a principle not heretofore recognized or held by e courts. Or, to hold that, because one of the creditors the defendant in the equity suit joined with other credrs to have their general interest represented in said suit, d petitioned the receivers appointed in such suit to ect experts to examine into the books of the debtor, d the receivers paid to the attorneys of the credits certain fees for services rendered in the equity suit, is made him a party to the said equity suit, would be an tire departure from the ordinary mode of making pars in equity causes. Though the plaintiff below may be terested in the creditors' bill, and as a creditor elect to me in according to the methods provided in such cases, d claim as a party to the suit, bearing his proportion of e expenses of the litigation, yet, until he does so come he is not to be held as an actual party to such suit. constitute him such a party, he must either join in the ing of the bill, or subsequently be made a party thereto. ere is no averment in the plea that he has done either: nce he cannot be held a party until the fact appears. tall events, he cannot be held to be, under such facts, suitor prosecuting two actions at the same time for the me cause and against the same party, and required to ect which he will prosecute.

To hold that where a portion of the creditors of at a levent debtor filed a creditors' bill for themselve, and chas might choose to come in and be made ported, ereto, this precluded other creditors from projection of the project

Tucker vs. Parks et al.

such cases to discharge the debtor from all liability, except as to the specific assets, as effectually as a judgment in bankruptey.

Judgment affirmed.

### TUCKER vs. PARKS et al.

[This case was argued at the last term, and the decision reserved.]

- 1. Whenever an application is made under the Code for a partition of lands and tenements, the same will be granted, unless it is made satisfactorily to appear to the court that a fair and equitable division thereof cannot be made by means of metes and bounds because of improvements thereon, or by reason of the premises being valuable for mining purposes, or for the erection of mills or other machinery, or that the value of the entire lands and tenements will be depreciated by the partition applied for. And it is the duty of the judge to look to all the facts and circumstances of each case and satisfy himself, before a sale is ordered, that the interest of each of the parties will be fully protected thereby. Nor should the fact that the mere pecuniary interest of one of the parties to the application might be benefited by a sale justify it, when the same would be injurious to the other common owners.
  - (a.) Where, on the trial of such an application, the judge charged that if the jury should believe that the value of the entire tract would be depreciated by a partition in kind, and that it would be to the best interest of all parties to have the land sold as a whole, and not divided in kind, they should find accordingly, but if they believe otherwise, they should find in favor of the application:

Held, that such charge was not error.

February 13, 1883.

Partition. Charge of Court. Before Judge POTTLE. Oglethorpe Superior Court. April Term, 1882.

Reported in the decision.

SAMUEL LUMPKIN, for plaintiff in error.

WHITSON G. JOHNSON, for defendants.

Tucker vs. Parks et al

# CRAWFORD, Justice.

The question which brings this case to this court is the sale or partition of one hundred and thirty-three acres of land of which Jacob Busbin died seized and possessed. His title came to him from the administrator of his father in June, eighteen hundred and twenty. He owed no debts, and his heirs, at the time of the application for partition, consisted of two living daughters, and the husband of a deceased daughter. The living daughters filed their petition in the court below for a partition of the land between the heirs; the son-in-law resisted the application, upon the ground that the value of the entire land would be depreciated by the partition applied for. The case went to a jury, and, under the testimony and charge of the court, their verdict was that the land be partitioned. The defendant then moved for a new trial, which the judge refused, and that refusal he brings to this court as error.

The motion for a new trial is based upon the ground that the judge, in charging the jury, coupled the question of value in the sale of the land with what was the best interest of all the parties under the circumstances of the case, and instructed them that, if they believed it was the best interest of all the parties to have the land sold as a whole and not divided, then they should find in favor of a sale, otherwise in favor of a partition.

The plaintiff in error complains that the judge did not submit the naked question of value alone, as it affected the interest of each individual heir in a sale or partition.

The law provides that in all cases where two or more persons are common owners of lands, whether by descent or purchase, and no provision is made by will or otherwise as to how said lands shall be divided, any one of the owners may apply to the superior court for a writ of partition. The other common owners of such land may file objections, showing any good and probable matter in bar of the

#### Tucker vs. Parks et al.

petition; whereupon an issue may be made up and tried by a jury.

It is further provided that, if either of the parties in interest shall make it satisfactorily appear that a fair and equitable division cannot be made by metes and bounds, by reason of improvements, or of the premises being valuable for mining purposes, or for the erection of mills or other machinery, or that the value of the entire tract will be depreciated by the partition, then the court may order a sale under such regulations, and upon such just and equitable terms as said court may prescribe.

In passing upon the question made by the record in this case, it is necessary that all the sections of the Code bearing upon partition be construed together. If this be done, it will be seen that a partition is always to be ordered. except in cases where it is shown that a fair and equitable division cannot be made by metes and bounds. When this is done, for any of the reasons named in the statute, or for other good and sufficient reasons, though not so named, then a sale of the land may be directed, but otherwise it is to be partitioned. It will be further seen that the statutes upon this subject were not expected to provide for and cover every case of application for partition that might be made. Hence it is provided that the court, in order to protect fully the interest of each of the parties, may deny altogether either a sale or partition of the land in question. Code, \$4006. From this power so conferred, it is clear that the interest of the parties, as to whether a sale or a partition should be ordered, was to be inquired into and considered before either was directed. Under the law and the facts of this case, we do not think that the judge erred in his instructions to the jury. Clothed as he was with power to hear and determine upon the facts found by the jury, whether he would order either a sale or partition, or deny both, it was his duty to have the interest of all the parties fully protected, and this he did

Carter, surviving partner, et al. re. Lipsey.

r sending the questions in issue to the jury with the inructions given, and they found in favor of partition. We think, too, that this was a proper case for the judge,

d it been necessary, to have framed the proceedings so to have met any exigency, without forcing these applints into a court of equity, that their rights might have en fully protected. The land in question had for two genations before theirs been in the family; for more than xty years it had been the home of their father and was en theirs. They were the only living heirs who were of e blood of the ancestor; two sisters, one single the other arried; the husband unthrifty; they wanted the home their childhood, and that which had been the home of eir fathers; if it went to sale, it passed away from them rever, they were too poor to buy it all; they petitioned e court to divide it between themselves and the husband their deceased sister; they brought proof more than efficient to show that an equal and fair division of the nd by metes and bounds could be had; they showed that artition was protection, and sale ruin. The judge put e whole case with its facts to the jury, whose verdict as that the land be divided. He was satisfied that to proct these applicants the verdict should be upheld, and wing committed no errors in the trial, his judgment is firmed.

Judgment affirmed.

CARTER, surviving partner, et al. vs. LIPSEY.

When a guardian takes the funds of his ward and puts the same into the business of a partnership, of which he is a member, or deposits them with the said partners, to be used in their business, or being so deposited, the funds are used with their consent, and the guardian dies, leaving such funds among the partnership assets, and the surviving partner, with notice thereof, takes the same into his own hands and continues business as surviving partner of the firm, and, becoming insolvent, makes an assignment

### Carter, surviving partner, et al. vs. Lipsey.

- of all the assets he has, including the trust funds of the ward in his hands, a bill seeking to recover the same is not without equity; especially when not only the firm, but also the securities on the guardian's bond, are insolvent. Nor does the right of garnishment furnish such a complete and adequate remedy at law as to oust a court of equity of its jurisdiction.
- (a.) The assignee of the surviving partner took only such title as the assignor had, and that encumbered with all the equities existing between the complainant and the assignor. In this bill it is claimed that trust funds of the complainant went into the partnership business, and were there at the death of one partner, with the knowledge of the other; and the books of the partnership carried notice in themselves of this liability; if not full notice, certainly enough to put the assignee on inquiry.
- (b.) After the dissolution of a partnership, the power of the partners is limited. A partnership having been dissolved by the death of one partner, the survivor had no power to renew or continue an existing liability or to change its dignity or nature. The deceased partner having been a guardian, upon his death, the law fixed a lien on all his estate of higher dignity than any claim by the creditors, for money due by him as guardian to his ward, an a such claim would take precedence of other debts.
- 2. Prior to the act of 1876, the issues made by the pleadings in an equity case were all tried and passed upon by the jury, but their finding was summed up in a general verdict. Since that act, upon request of counsel, made before the beginning of the introduction of evidence, special issues may be submitted, and a verdict rendered, finding on each separately. In such a case, the presiding judge, when charging the jury, shall inform them what issues of fact are made by the pleadings; but he is not required to do this before the argument of counsel has begun.
- 3. There was no error in rejecting evidence to the effect that the deceased guardian was one of the commissioners to build the court-house in Lee county in 1871-2, and that he kept the accounts of the commissioners on the books of one Stokes, for whom he was an employé.
- The verdict was supported by the evidence, and the decree was correct.
- (a.) Verdicts are to have a reasonable intendment, and are to receive a reasonable construction, and should not be avoided unless from necessity.

May 1, 1883.

Guardian and Ward. Partnership. Debtor and Creditor. Assignments. Equity. Trusts. Practice in Superior Court. Before Judge Fort. Lee Superior Court. November Term, 1882.

Car'er, surviving partner, et al es. Lipsey.

eported in the decision.

- W. WARWICK; FRED. H. WEST, for plaintiffs in r.
- 7. H. KIMBROUGH; D. A. VASON; W. A. HAWKINS, for endant.

WFORD, Justice.

- . A. Lipsey, by his next friend, filed this bill against plaintiffs in error, to recover certain assets in the hands W. Warwick, as the assignee of John T. Carter, surng partner of the firm of Tison & Carter, which he med should be declared a trust fund in the hands of said assignee, for the payment of his demand. d that H. B. Lipsey, his father, died in 1873, leaving a e and four children, since which time the wife and one he children have died; that J. P. Tison became the rdian for the children, and received about \$3,300 as n guardian; that he was a member of the firm of Tison carter, merchants, and put the said sum of money in business of said firm, or deposited it with them; that said Tison died insolvent, and his securities on the rdian's bond are also insolvent; that, after Tison's th, Carter, the surviving partner, made an assignment all the property and assets of the firm to G. W. Wark, first, for the benefit of certain preferred creditors; second, for the creditors generally. That the firm, as l as Carter, are insolvent.
- the prayer of the bill is that the claim of the complainmay be declared to be a trust debt, and decreed to be d in preference to all other debts.
- to this bill a demurrer was filed, upon the ground that ras without equity, and that the complainant had a aplete remedy, by garnishment, at common law. This nurrer was overruled, and that decision is assigned as or.

Carter, surviving partner, d al vs. Lipsey.

1. Where a guardian takes the funds of his ward and puts the same into the business of a partnership of which he is a member, or deposits them with the said partners, to be used in their business, or, being so deposited, are used with their consent, and the guardian dies, leaving the funds among the partnership assets, and the surviving partner, with notice thereof, takes the same into his own hands, and continues business as surviving partner of the firm, and, becoming insolvent, makes an assignment of all the assets he has, including the trust funds of the wards in his hands as such surviving partner, a bill seeking to recover the same is not without equity, and especially when not only the firm, but the securities on the guardian's bond, are insolvent. Nor does the right of garnishment furnish such complete and adequate remedy at law as to oust a court of equity of its jurisdiction.

But it is insisted that the assignee had no notice of the trust, and therefore, his title will be protected. this it is replied that the assignee only took such title as the assignor had, and that encumbered with all the equities existing between the complainant and the assignor. In addition to this, however, section 1917 of the Code declares that, after the dissolution of the partnership, the power of the partners is limited; and here the death of Tison dissolved this partnership, and Carter had no power to renew or continue an existing liability, or to change its dignity or its nature. Upon the death of the guardian, the debts due by him as such guardian had priority over all others, except such as are specially provided for by section 2533 of the Code. Besides this, the allegation in complainant's bill is, that this trust money went into the partnership business; was there at the death of Tison, and with the knowledge of Carter; so that the complainant had the right to pursue this fund in the hands of the assignee, upon both the grounds stated. Upon the first, the moment that Tison died, the law fixed a statutory lien on all his estate, of higher dignity than any claimed by

Carter, surviving partner et al. rs. Lipsey.

reditors; and if the creditors of the partnership had such, they do not appear from the record. 65 Ga., Upon the second ground, the books of the partner-carried notice in themselves of this liability; if not notice, certainly enough to put the assignee on inquiry. e was no error in overruling the demurrer.

- e defendants filed their answers, Carter denying that part of the trust estate of complainant ever went into rm of Tison & Carter, and Warwick, the assignee, denyll knowledge of the business until the assignment made.
- on the submission of the issues to the jury, they if the following material facts: That \$1,048.51 of the funds of the wards went into the hands of the firm of Tick Carter, was mixed with their money and assets, and ed as their own; that Carter knew they were such trust and used in the general business of the firm; that is 3.23 went into the hands of Warwick, the assignee; J. A. Lipsey owed Tison & Carter, at the time of the nment, \$298.53, and Tison & Carter owed him is 8.51. A decree was entered up for the difference bean these amounts, being \$749.99 against Carter, and against the assets in the hands of the assignee.
- e defendants made a motion for a new trial:
- ) Because the court erred in overruling the demurrer e bill.—This having been disposed of in a former part e opinion, need not be again referred to on the mofor a new trial.
- ) Because the court erred in not presenting the issues e jury before the argument of counsel began, instead esenting them after they had been concluded.
- It is sufficient to say of this ground, that section 4206 e Code and the seventh equity rule of practice settle objection just as it was directed by the judge, and ast the view taken by the plaintiff in error. Special cts of the facts only may be found by the jury, on trial of chancery cases, when requested by counsel

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before the beginning of the introduction of the ev and the presiding judge, when charging the jury, s form them what issues of fact are made by the pl in the cause. Before the passage of the act of 1876 subject, the issues made by the pleadings were a and passed on by the jury, as now, but summed general verdict; and these, from the number in often greatly confused the jury and made them verdicts unsatisfactory to the chancellor, applicab to part of the case, and frequently the result of a c mise of the special and material facts, to reach a By this act a change is made, only to the of changing the finding from a general verdict on issues made by the pleading, to a special verdict of issue separately, and which greatly aids both cha and jury in the proper adjudication of the rights parties.

- 3. The next ground of the motion for a new trial the judge erred in refusing to allow defendant's corprove that J. P. Tison was one of the commission build a court-house in Lee county in 1871-2, and the kept the account of the commissioners on the book M. Stokes, for whom he was then a clerk. There possible connection between such a fact and the issuin this case.
- 4. The remaining grounds of the motion for a neare that the findings of the jury, on the several issumitted to them, are contrary to evidence, against the evidence, and without evidence to support Whilst the evidence affords ground for argument a cussion between the parties, as to whether or not it ized the verdict rendered on each issue, yet it can justly claimed that they are either against the evor without the evidence to support them.

That Tison had the property, and received the belonging to the wards, was clear. And it was a by defendants' counsel that the extracts of accounts

Carter, surviving partner, et al. vs. Lipsey.

dence were true extracts from the books of Tison & c. From these books of this firm it appears that 5.55 was received of the trust money, and that 2.32 was paid out for the wards, through the store, rincipally in goods. Adding the testimony of Lipsey s, we think the jury did not find contrary to the evipon or were they without evidence to authorize their gs.

or is also assigned on the decree entered by the ellor, because it is not authorized by the facts by the jury, or the law applicable thereto; and er, because the claim has no privity, as stated, st Carter, the surviving partner, nor as against the of the firm that went into the hands of Warwick, signee, as the jury found that \$1,023.23 went into ands. It seems to us that the decree is a proper one made, under the pleadings and the facts as found by ry. If the ruling which we have made on the deer is correct, we think that there is no error in the e made. In so far as the finding of the jury is cond, as to the amount of money that went into the nee's hands, it was not meant that so many dollars in went, but that was the sum in his hands left, after eting the amount which the deceased guardian had ided for the wards.

rdicts are to have a reasonable intendment, and are seive a reasonable construction, and are not to be ed, unless from necessity. Code, §3561.

Igment affirmed.

Kneeland re. Connally.

### KNEELAND vs. CONNALLY.

[This case was brought forward from the last term, under §4271 (a) of the Code.]

- There is no law by which the chief of police of the city of Atlanta can be ruled by the superior court.
- 2. A house or room where gaming is carried on, or is suspected on common knowledge to be carried on, may be broken open to arrest the keeper and seize the tools of his trade, on legal authority; and a warrant for the seizure of the keeper of the unlawful house or room carries with it the power or legal authority to seize the implements of his crime.
- (a.) Therefore, where the chief of police of the city of Atlanta, under a warrant from the mayor to arrest the keeper of a gaming house, forcibly entered the room where such gaming was commonly known to be carried on, and besides arresting the defendant in the warrant, seized the gaming implements found there, which he held first under verbal order and afterwards under written warrant from the mayor, to be used as evidence before the grand jury, such action furnishes no ground for a rule.

February 20, 1883.

Municipal Corporations. Officers. Police. Criminal Law. Before Judge HILLYER. Fulton Superior Court. April Term, 1882.

Reported in the decision.

VAN EPPS, CALHOUN & KING, for plaintiff in error.

B. H. HILL, solicitor general; B. F. CARTER, for defendant.

Jackson, Chief Justice.

The plaintiff in error ruled the defendant in the superior court for detaining certain tables which had been seized when the plaintiff in error was arrested by virtue of a warrant from the mayor of Atlanta to arrest him. Defendant in error was chief of police of the city of Atlanta.

1. We know of no law by which the chief of police of the city of Atlanta can be ruled by the superior court.

### Kneeland vs. Connally.

There could, if there be no such law, be no error in discharging the rule.

2. When the defendant was arrested, the chief of police forcibly entered the room suspected to be used for gaming, and commonly known to be used as a gaming room, and seized faro and roulette tables therein, with other tools and implements used for gaming, and detained them to be used as evidence before the grand jury by verbal order, and afterwards written warrant, from the mayor. Subsequently, they were delivered up, and had been used for gaming in the same room.

Even if the chief of police had been subject to rule, it was properly discharged. The implements of crime should be detained as evidence, and seized to be so detained; and the house or room where gaming is carried on or suspected on common knowledge to be carried on, may be broken open to arrest the keeper and seize the tools of his trade on legal authority. Code, §4547. The warrant to seize the keeper of the unlawful house or room carries with it the power or legal authority to seize the implements of his crime, just as a warrant to arrest a man charged with murder would carry with it authority to seize the bloody knife or smoking pistol which killed, or a warrant to arrest a counterfeiter would include the legal seizure of his tools for counterfeiting. No separate warrant is necessary in either case.

But this plaintiff in error, it appears from the untraversed answer of the chief of police, has now the implements of his illegal avocation already in his possession, delivered to him after the seizure, and still carries on the criminal business with them. For what then is he ruling? What more does he want? What could he get by rule? What does he ask for except that which he has,—these unholy appliances of his dreadful avocation? In any view of the case, the rule should have been discharged. It should have been discharged long before it was; the very moment it appeared that the defendant to it was

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chief of police, it should have been dismissed; been the law gives no authority-to the superior court to that officer of the city at all.

Judgment affirmed.

# Dunn vs. Hallett, Seaver & Burbank.

[This case was brought forward from the last term, under \$4271 (a) of the

- Where it appears from a bill of exceptions that the case we mitted to the court below on an agreed statement of facts, such agreed statement is set out, this court cannot consider ception to the judgment based thereon.
- 2. Where the bill of exceptions shows that, at the time of submitt case to the presiding judge, a record forming a part of the colost, and counsel agreed as to its contents, if such record we sequently found and showed a different state of facts from agreed upon by counsel, this court cannot review the judge the court below on the basis of such record. A judgment color be reviewed by considering what was before the presiding the court cannot review.

March 13, 18.8.

when it was rendered.

Practice in Supreme Court. At February Term

The bill of exceptions in this case contains, in bri following allegations: At the May Term, 1882, of superior court, there came on for trial, before Judge kins, the case of Hallett, Seaver & Burbank vs. B. Harris, and D. T. Dunn, garnishee, being a certiorari justice's court, which had been remanded from the Su Court, with instructions to call into court certain from the hands of the garnishee for sale. Upon the of the remitter, an order was taken calling on to nishee to bring the notes into court to be sold to pudgment of Hallett, Seaver & Burbank vs. Blain ris; remainder to be held subject to the order of

The respondent answered that, pending the certioral

Dunn rs. Hallett, Seaver & Burbank

e instituted against Blain & Harris in the county court, ments were recovered, garnishments were issued, and respondent was required, under order, to bring the notes court for sale. He also alleged in his answer that notice was given of the former answer in the justice rt in answering the garnishments in the county court, that notice of said garnishment proceedings in the nty court were given to Hallett, Seaver & Burbank. his answer Hallett, Seaver and Burbank filed a traverse, ying notice of the garnishment proceedings in the nty court, or that the judgments in that court were earliest in point of date. On the argument of this case, vas impossible to find the answer and traverse, "but points made on the traverse were waived, and the case ued upon the presumption that the judgments in county rt were younger than those in the case of Hallett, ver & Burbank, and that Hallett, Seaver & Burbank no notice of proceedings in county court." The court ed whether Dunn had answered in the county court t he had been garnished in another court; being unable ind the papers, counsel stated that his recollection was t Dunn did not so answer in the county court. But answer has since been found, and shows this to have n a mistake. It was admitted by counsel for both sides t the notes were sold by order of the county court, and ld not therefore be produced in the superior court. rt rendered judgment in favor of the plaintiffs (copyit in full), and the garnishee excepted. bill of exceptions.

The certificate of the presiding judge stated that the bill exceptions was true "and together with the record in I cause, contains all the evidence material," etc. At conclusion of the certificate appears the following: "I ther certify and attach the subjoined letter dated 11th July, 1882, and marked "A," and written by Messrs. odyear & Kay, as part of the record and bill of excep-

### Dunn vs. Hallett, Seaver & Burbank,

tions, as showing what was before the court when the judgment was rendered in May last." (Signed by the judge.)

Following this is a letter marked "A", directed to Judge Tompkins and signed "Goodyear, Harris & Kay, attorneys for D. T. Dunn, by Goodyear & Kay." This letter states that the writers forward to the judge the bill of exceptions "which does not conform to the agreed statement of facts upon which the case was decided in the portion marked with pencil lines, for the following reasons," etc. The letter then proceeds to recite the occurrences of the trial, and claims the right to use the answer of Dunn, since found, and concerning which the error in statement of counsel was made on the hearing.

The judgment excepted to, which is contained in the record and copied in the bill of exceptions, states that "upon agreed statement of facts in the above stated case, judgment is rendered," etc.

There was also an agreement of counsel contained in the record that the record "shall consist of the remitter from the Supreme Court, of date May 9th, 1877, the order calling D. T. Dunn to bring notes into court or to show cause to the contrary, the answer of D. T. Dunn thereto, the traverse to said answer, and the judgment of the court, of date May 23, 1882, thereon." And the record was sent up to the Supreme Court accordingly.

On the call of the case, counsel for defendant in error moved to dismiss the writ of error for the following reasons:

- (1.) Because the record and bill of exceptions show that there was an agreed statement of facts, which is not in the bill of exceptions.
- (2.) Because, if the letter attached to the bill of exceptions is properly before the court, it contradicts the bill of exceptions, but shows that there was an agreed statement of facts, which was nowhere set out; and an *ex parte* statement of what was done at the hearing could not take

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e place of the agreed statement on which the judgment is based.

(3.) Because the certificate of the presiding judge reered to the record to supplement the bill of exceptions to evidence; but the record contained no evidence, and as itself curtailed and limited by agreement of counsel. The motion was sustained.

F. H. HARRIS; (+000YEAR & KAY, for plaintiff in error.

S. W. HITCH; IRA E. SMITH, for defendants.

ckson, Chief Justice.

The judgment of the court below was based upon an creed statement of facts. To review it, those facts must opear in the bill of exceptions. They do not appear in its, and therefore error based on a judgment upon those cts does not appear and cannot appear here, so as to be eviewed.

Further, it appears that what was agreed upon as ontained in a lost record is not true, as appears from he record since found, and that record is sought to be hade part of the writ of error to a judgment not rendered in it, but on a mistake in regard to it, the court considering the recollection and agreement of counsel as to what he record contained in the place of the record, and adjusticating the point before it, not on the record as found, but in the agreement about it. So far as this case is contended, the record cannot change what was before the ladge below; because we review only his judgment on what has before him; and hence that record cannot be considered here.

Moreover, the letter appended to the bill of exceptions y order of the judge, from counsel for plaintiff in error, self shows that the facts recited in the bill of exceptions re not the facts before the court below when the case was djudicated.

Langley, constable, w. Wynn.

So that the writ of error must be dismissed, fi cause the agreed statement of facts is not clearly in the bill of exceptions, and secondly, because therein set out is not the facts which were before the below.

Writ of error dismissed.

# Langley, constable, vs. Wynn.

1. The rule nisi against the constable in this case was sufplain and full to inform him for what he was ruled, and his shows that he understood it fully.

2. Where furniture was distrained for rent, it was not the jof the levying constable to judge in regard to the correct the initials of the name of a defendant in the distress and to fail to realize the money thereon because such initiprobably incorrectly stated; especially when the right deacknowledged the debt and for awhile the bailiff took his way gave him time to pay.

3. The constable seems not to have demanded a trial by jurmotion to attach for contempt, even if entitled to do so founded on contempt of court.

4. After a rule absolute has been obtained against a constable ing him to pay money to the movant, what subsequently pires would hardly relieve him from contempt in not pay and the consequent attachment therefor. That the constable a levy after the rule absolute to which a claim was interposts sustained, would scarcely relieve him from attachment for to pay under the rule absolute.

 Under the facts of this case, the constable ought, according and the duties it imposes on its officers, to pay this de May 1, 1883.

Constables. Officers. Levy and Sale. Conf Attachment. Judgments. Before Judge HILLYER. ton Superior Court. September Term, 1882.

Reported in the decision.

C. W. SMITH; J. T. PENDLETON, for plaintiff in e

.A. R. Hightower, for defendant.

Langley, constable, vs. Wynn.

CKSON, Chief Justice.

It appears from the record that a rule nisi was granted ainst the plaintiff in error, a constable, for failing to levy. llect the money, and pay over the same, due for rent, on listress warrant therefor; that the constable failed to swer; that the rule was made absolute, and a rule nisi taching him for contempt was served, and he arrested; d then he made answer that he could find no such pern as the defendant, nor any property to levy on, but was formed that he lived in New York. Thereupon he was scharged from custody, the rule absolute ordering him eremptorily to pay the money due on the distress warnt, was set aside, and he was ordered to answer the rule si on the next morning, October 13, 1882, and show use why he should not pay over the money due. Thereoon he answered, and showed for cause that the party ho probably owed the debt was Basil M. Lannau, and not B. Lanean, as set out in the warrant; that he levied on me property of Basil M. Laneau, and advertised it for le on the fourth Tuesday in September, 1882, but did ot sell it because he had a stock of goods to sell which ok the day; that Basil Laneau admitted that he owed e debt distrained for, but claimed that the property had een set apart to him as a homestead, and that he had one his whole duty and more than his duty to collect aintiff's money. Upon the rule nisi and this answer, e court below passed this order: "The above stated se came on to be heard this day, and after hearing evience and agreements (?) of counsel, it is considered, orred and adjudged by the court that the rule in said case e made absolute against said constable, and that he be lowed until 5 o'clock P.M. of the 24th of October inst., pay over to the plaintiff or his attorney, the principal, terest and costs due on the distress warrant named in e rule nisi. This October 13, 1882."

On the 24th of October he failed to pay the money.

Langley, constable, vs. Wynn.

On the 30th a rule, to show cause the next morning

he should not be attached as for contempt, was gra To that he answered that, since the rule absolute granted, he had advertised the property of B. M. La for sale on the fourth Tuesday in October, 1882; that fore he could sell it that day, a claim was put in b wife, tried the same day, and the property found not ject, and that he could find no other property. Or same day that this answer was made, he moved to aside the rule absolute, on the grounds that the rule was not distinct enough in stating facts to authorize rule absolute; that he could not find any property B. Laneau; that the court did not try the rule before jury; and because, since the rule absolute, the wife's contractions of the rule absolute, the rule absolute, the rule absolute absolute absolute and the rule absolute absolute abs

Upon this answer to the rule nisi for contempt, and motion to set aside the rule absolute, the court passed following order:

to the property was sustained.

"I think the rule absolute, on the 13th of October is conclusive upon all questions well pleaded in resp to the attachment; and it is ordered that, unless respondent pay into court by, or before, 12 o'clock on day next, the several amounts required by said rule a lute, that he be arrested by the sheriff and stand communtil he does pay. This 14th November, 1882."

Upon this judgment and the preliminary orders of court, error is assigned here.

We think that the court below manifested mucl tience, and dealt with great indulgence with the pla in error, under the facts which this record discloses.

He failed to make answer at all, though served, the preceding stages of the rule to make him returnactings and doings in regard to this distress warrant only when in the hands of the sheriff did he answer at Then he put his answer to the attachment for contempthe ground that he could find no such defendant an property on which to levy. The judge relieved him of

Langley, constable, rs. Wynn.

tempt and his imprisonment therefor, and allowed on that showing, to answer the rule nisi, setting aside first rule absolute, as well as the first attachment for tempt. Then he answered that he had found a man of same surname, but not the same initials, who acknowled that he owed the debt and had property subject to listrained for the rent, but could not sell for want of time. reupon, the judge heard evidence, and the plaintiff's nsel swore that the distress warrant was a long time in hands of the constable,—ever since April; that he retedly urged him to make the money; that the constable I defendant in the warrant had promised to pay it if would wait; then that he had levied on property, and endant's wife had claimed it,—this was long after the rant was put in constable's hands;—then that the m was withdrawn, and he had advertised the property sale on the 4th Tuesday in September; that on that he did not sell; and then plaintiff's attorney swore t he ruled him.

This testimony was not denied by the constable, who is also sworn, but asserted again his failure to sell, bese of the sale of goods first, and then the wife's claim light judgment for her; but furnished no record or written dence of the claim and judgment thereon, either in his wer to the rule nisi, or his sworn testimony before the ge.

We see no error, therefore, in the court below, in dengthe motion to set aside the rule absolute, or in pass-the order requiring the payment of the amount due the distress warrant, on pain of being taken into custody the sheriff and held until it was paid. There was no all proof before the judge that the claim was interposed, and decided; nor was there any that the plaintiff is not injured by the long negligence of the constable to ke the money. On the contrary, the sensible presumption, arising on the facts, as well as the legal presumption his failure to levy, and the divers excuses he made

Central Railroad vs. Roach.

therefor, and his failure to return the distress was with his action thereon, is that his conduct did hus plaintiff.

The rule nisi was sufficiently plain and full to in him for what he was ruled, and his answer shows th knew exactly what he was ruled for. The furnitur distrained for rent, and it was no business of his to in regard to the initials of the name of a party in a di warrant, especially when the right man acknowle that he owed the money for the rent, and for a whi had taken his word for it and given him time. He to have demanded no trial by jury, even if entitled on a rule founded on contempt of court; and that g is evidently an afterthought of the motion to set What transpired subsequently to the rule absolute t the money, would hardly relieve him from contempt paying it, and the legal sequence thereof, attachment for contempt, even if the claim by the wife had been prov competent evidence. His neglect and delay seem to been in the interest, and certainly they worked to the a tage of the defendant and his wife, and thereby hur plaintiff, for whom he was acting. In every view of the he ought, according to law and the duties it imposes officers, to pay this debt.

Judgment affirmed.

judicata does not apply.

### CENTRAL RAILROAD vs. ROACH.

### [Two justices presiding]

1. There was no error in overruling the motion to dismiss this (a.) The cases of Daly vs. Stoddard, 66 Ga., 145, and McDone Eagle and Phenix Manufacturing Company, 67 Ib., 761, we cided after this case was before the court on a former occ (64 Ga., 365); no question as to the necessity of criminal gence in a co-employé was then made, and the doctrine of the court of t

(b.) This court has held, by a full bench, that, to entitle the wid a servant to recover against the principal for the homic

### Central Railroad vs Roach.

her husband resulting from the negligence of a fellow-servant, it must appear that the homicide amounted to a crime in such neglectful servant, either murder or manslaughter of some grade. The law in respect to the liability of railroad companies and druggists rests on other grounds.

IALL, J., not concurring in the principle of the last head-note.

c.) An adjudication by a full bench cannot be modified or reversed where only two members of the court preside. Where a principle has been settled by a unanimous judgment of a full court, and afterwards the reverse of it is laid down by a like unanimous judgment of a full bench, without any application for review or reference to the first judgment, no opinion is intimated as to which would bind the court.

. Taken alone, the charge complained of might have been imperfect, for want of fullness, but in connection with its context, the charge was full and in accordance with the former rulings of this court.

. A verdict for damages will not be set aside for excessiveness unless the amount found be so excessive as to authorize a suspicion that it was the result of bias or prejudice, or to justify the inference of gross mistake.

ACKSON, C. J., concurred specially.

August 27, 18×3.

Railroads. Damages. Negligence. Master and Servant. Practice in Supreme Court. Res adjudicata. Before Judge Tompkins. Chatham Superior Court. June Term, 1882.

Reported in the decision.

A. R. LAWTON, for plaintiff in error.

R. E. LESTER, for defendant.

HALL, Justice.

On July 23d, 1878, the plaintiff filed her declaration in he superior court of Chatham county against the defendant, claiming damages for the death of her husband, who was killed by an injury received while in the employment of the defendant as a locomotive engineer.

The declaration set forth that,

"On the night of the twenty-seventh day of January, in the year

Central Railroad vs. Roach

of our Lord one thousand eight hundred and seventy-eight, the The Central Railroad and Banking Company of Georgia, a con tion as aforesaid, by the negligence, carelessness and unskillfulne itself, its agents, servants and employés, so demeaned itself cause the death of the said Alexander J. Roach, the husband of petitioner, thereby depriving your petitioner of the comfort, p tion and support of her said husband, the said Alexander J. R to the great damage of your petitioner, to-wit, the sum of ten sand dollars, which said amount the said defendant, although requested, refuses to pay. And your petitioner further shows the said The Central Railroad and Banking Company, a corpor incorporated under the laws of Georgia, and having its place of ness and running its railroad cars and locomotives in the cour Chatham and state aforesaid, hath endamaged your petitioner in to-wit: For that, whereas heretofore, to-wit, on the night of twenty-seventh day of January, in the year of our Lord one thou eight hundred and seventy-eight, the said corporation above tioned being then and there the owner and proprietor of certain gines and cars, running on its said railroad between the city of vannah and the city of Macon, said engines and trains being and there managed and controlled by the agents, servants and ployés of the said corporation, the husband of your petitioner, ander J. Roach, being then and there in the employ of the said poration, and running one of the engines which was running juhind another engine and cars, which last mentioned engine and was managed and run by one James Greenlaw, who was ther there the agent and employé of the said corporation; that the engine and cars which were just ahead of the one on which your tioner's husband was, was slackened up without any warning to prevent the other from running into it, and without any reason, thereby causing the engine and cars on which your tioner's said husband was employed, to collide with the said prec engine and cars, and thereby causing great injuries to your pet er's said husband, from which, after languishing for ten days, he "That the engine and cars on which your petitioner's said hus

"That the engine and cars on which your petitioner's said hus was employed were running on schedule time, and were in proper places according to the schedule of the road, and that the cident which resulted in his death was caused wholly by the management of those in charge of the engine preceding the e and cars run by your petitioner's said husband.

"That at the time of the killing of her said husband by the gence, mismanagement, and unskillfulness of the said defendance agents, employés, etc., he was in his sixty-first year of age, wound health, was an experienced engineer, having been in the ploy of the defendant for about twenty-four years in that cap was an industrious and hard-working man, and was, by his per

### Central Railroad re. Roach

rtions, capable of making and did make a yearly income of ars; that he rendered to herself and children a comfortable supt, besides laying by the sum of about ——— dollars yearly for ir benefit; that, in all human probability, he would have lived continued to support your petitioner and her said children, for umber of years, to-wit, the number of ——— years, but for the elessness, negligence and unskillfulness of the said defendant, its nts, employés, etc., whereby his death was caused, thereby deing your petitioner of the support, protection and comfort of her I husband, to her great damage, to-wit, the sum of ten thousand ars."

On July 3, 1882, when the case was called for trial, the endant filed a motion to dismiss the declaration, as fol-

And now comes the defendant, by its attorney, and moves the rt to dismiss the plaintiff's suit, on the ground that the declaradoes not set forth any cause of action against the said defendant. ecially in this, that the said declaration does not aver any crimiact or negligence on the part of the said defendant, or its emvés, which resulted in the death of the plaintiff's husband."

The plaintiff then filed the following amendment to the laration:

And your petitioner shows that the said acts of the said James enlaw, the agent and manager as aforesaid of the defendant coration, by which the said Alexander J. Roach was killed as aforel, were done by him without due caution and circumspection."

July 5, 1882, the court overruled the motion to disss, by order in writing, as follows:

It is ordered and adjudged that the motion of defendant, made filed the 3d day of July of this term, to dismiss the plaintiff's laration, on the ground that the declaration does not set forth any se of action against the defendant, especially that the declaration s not set forth any criminal act or negligence on the part of delant or its employés which resulted in the death of the plaintiff's band, be and the same is hereby overruled."

To this order the defendant excepted pendente lite the ne day, and the case proceeded immediately.

There having been a verdict \* against the defendant, it ngs the case here, and assigns error upon this bill of eptions.

he verdict was for \$5,000.00. (Rep.)

s:

1. The defendant insists that the homicide of the

Central Railroad vs. Roach.

tiff's husband must have been criminal, and not a tortious, to entitle her to this action, and counsel in support of his position two decisions of this court vs. Stoddard et al., 66 Ga., 145, and McDonald v. Eagle and Phenix Manufacturing Company, 67 It Both of these decisions were made after this cas before the court on a former occasion. When here before, no such question as that now made we sented or passed upon (66 Ga., 635); and we may, fore, dismiss from our consideration the point, so st pressed by plaintiff's counsel, that the question is a judicata.

We concur in opinion, but for different reasons, the decision of the court below, upon this assignment of Whether necessary or not to should be affirmed. termination of the cases cited, this court, by a full held that "to entitle the widow of a servant to r against the principal for the negligence of a fellow-s of the same principal, for the homicide of the hu which resulted from such negligence, it must appear the homicide amounted to a crime in such neglecti vant, either murder or manslaughter of some grade the body of this last decision cited (which had bee posed to be lost, but since the imperfect publication Ga., 763, of the questions it was supposed to decide been found\*), it is distinctly stated that "the law spect to the liability of railroad companies and dru rests on other grounds." Code, §§3005, 2083, 3036 are cited.

I do not intend, by anything here said, to signiconcurrence in the first proposition laid down

Our Code, §2968, declares that "a physical injury to another, gives a right of action, whatever may intention of the actor, unless he is justified under rule of law. The intention should be considered Central Railroad vs. Roach.

sessment of damages." "Any violent injury, or attempt commit a violent injury illegally" (not criminally), "upon person, is a tort, for which damages may be recovered." 2969. That these sections are taken from the common v, especially in so far as respects the intention of the t feasor. See Broom's Com. C. L., 683, et seq., and cases ere cited; 1 Add. Torts, §40. Under the same title, icle and chapter of the Code where these sections are and, and in close connection with them, is found likese \$2971, which gives to "a widow, or if no widow, to the ld or children," an action "for the homicide of the husnd or parent." So far as the right to bring a suit by se persons is concerned, this does away with the comn law maxim actio personalis moritur cum persona, and ows the widow and children a remedy wherever the sband or parent, if in life, could have maintained it, makthe suit in the case subject to the same defences it uld have been, had the husband or parent, instead of widow or children, prosecuted it, as this court held in e Western and Atlantic Railroad Company vs. Strong. Ga., 466. It was there stated by McCay, J., who deered the opinion, that, "by our law, the right was given erally to the wife for the homicide of the husband. s does not cover every case of homicide. Cases of selfence, of inevitable accident, of execution by command aw, etc., must, from the nature of things, be excepted; t the true inquiry in all such cases is, has the defendant lated any of the private or public obligations he was ler to the deceased; that, whether those obligations or ies were implied by law or existed by contract, was naterial, but that some duty, public or private, was vioed by the homicide, would seem to follow, from the very are of the wrong and from the principles of justice and ity."

low far the liabilities of railroad corporations differ n those of natural persons, or whether they stand upon ther and different footing, it is needless to inquire. It

Central Railroad to Roach.

has been determined by a full bench that they do; and determination cannot be reviewed, modified or reversed der our law, where only two members of the court pre Code, §217.

To guard against misapprehension, it may be to state that, where a principle has been settled unanimous judgment of a full court, and afterward reverse of it is laid down as correct by a like unanijudgment of a full bench, without an observance conditions prescribed by this section of the Code, or out any reference to the first judgment, as sometime avoidably happens, we do not intimate an opinion which ruling, the first or the last, we would be oblig follow, were this point raised and insisted upon question, with the others, is left for the determination full court.

Neither is it material to inquire, in this connection far the civil liability of railroad companies for injur affected, if affected at all, by the act of 1876, p. 111, ( \$4586(b)), which makes the offence of "criminal gence" upon the part of persons employed in any car whatever by such companies, to consist in the inflict serious injury, other than death, caused by the omiss duty or by any act of commission, upon the part of suc vant, in the course of his employment, and subjecting upon conviction, to punishment. It may be that this le tion, as contended by some, does countenance the ide every act of negligence upon the part of the agents of companies does, by fair construction, characterize a the responsibility of the principal, in a civil proceed recover damages; or, as maintained by others, the civil liability of the company is thereby unaffected the provision touches only employes, and is as favo to the companies themselves, in giving them more eff power over the conduct of their servants, as to the p Between these seemingly conflicting interpretation

do not decide.

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In any event, whether one or the other of the views ken of the main question here presented, be correct, the sult is the same, as we both agree that the motion to smiss the action in this case, upon the ground stated erein, was properly overruled by the court. This dissess of the defendant's bill of exceptions pendente lite, and also of the first ground of the motion for a new trial.

2. Complaint is made, in the second ground of the moon for a new trial, that the court erred in charging the
ry, at plaintiff's request, that "a railroad company is
able for any damage done to persons by the running of the
comotives, or cars, or other machinery of such company,
for damage done by any person in the employment of
ch company, unless the company shall make it appear
at their agents have exercised all ordinary and reasonalle care and diligence, the presumption in all cases being
ainst the company."

This charge, as far as it goes, correctly lays down the w. Had it stopped here, without specifying other contions upon which the defendant's liability depended, ere would, perhaps, have been ground for the exception ken. It was, however, completed in this respect by nat immediately followed, viz: "If the person injured himself an employé of the company, and the damage done by another employé and without fault or neglince on the part of the person injured, his employment all be no bar to the recovery.

This means that the rule of law as to the right of recovery the same in the case of an employé, and another person t connected with the road, except that, in case of an aployé who is directly concerned in the act which results injury, he must show one of two things—either that he is not to blame, or that the company or its employé was blame; when he has shown either of these two things, stands as any other person would; that is, he has a right recover, but not unless the evidence shows that he was athout any kind of fault himself, and that the company

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was at fault. The rule of law laid down by the Sup Court being thus; after proving the fact and degree of injury, if the plaintiff will show himself not to blame law then presumes, until the contrary appears, that company was to blame.

"If, then, you believe from the evidence that R

All these requests are a substantial, if not a literal,

was not to blame in the act which caused his death, the presumption is against the company, and you sh find for the plaintiff, unless the evidence shows tha company, or its other employés concerned in this ma was not at fault."

pliance with the principles laid down by this court, a cable to this case, when it was here on a former occa Indeed, every phase of the case is covered by the requirement in charge at the instance of each of the parties, by the general charge of the judge. No other porticit is excepted to than that above quoted; and being in formity to the decision of this court, the principles it e

ciates must, as to this case, be considered res adjudi-3. There is evidence to sustain the verdict; the case

been fully and fairly submitted to the jury, both as to law and the facts. We do not think the verdict find excessive amount, as alleged in the defendant's motio a new trial. The lower court was not of opinion that amount found was so excessive as to authorize a suspit that it was the result of bias or prejudice entertained the jury finding it (Code, §3067), or as to justify the ince of "a gross mistake" upon their part (Ib., §2947), such were the only conditions upon which either the

the lower court could interfere with the verdict.

Judgment affirmed.

JACKSON, Chief Justice, concurring.

I concur in the judgment.

In respect to the point that there can be no recounless the defendant, through its agents, was guilt

J. T. & W. H. Reese, for use, vs. Tollerson & Kirby.

micide, either wilfully, as in cases of murder and volunty manslaughter, or unintentionally, as in cases of influntary manslaughter by criminal negligence, it is ough to say that the ruling in Daly vs. Stoddard, 66 a., 145, and in McDonald vs. The Eagle and Phenix anufacturing Company, 68 Ga., 839, is inapplicable to Iroad companies, as was distinctly announced in the inion in the latter case.

In the last paragraph of the opinion in that case, drugts and railroad companies are expressly excepted from e rule, by a unanimous court, and the sections of the de are cited on which the exception is based. Until riewed and reversed by a full bench, the principle apcable to the facts in the Daly and Stoddard and Eagle d Phenix cases is law, and the exception of its operan in railroad cases is law in the same way and to the ne extent. We are not asked to review either, and ald not if asked, because the court is not full. This is a lroad case, and covered by the exception in the Eagle d Phenix case; and therefore, the refusal to dismiss the ion, and the overruling the motion for a new trial on e first ground, is right, because the Eagle and Phenix inion, of a full unanimous court, sustains it, and two lges, even if desired, have no power to reverse it or reew it. "Sufficient unto the day is the evil thereof."

J. T. & W. H. REESE, for use, vs. Tollerson & Kirby.

nere, prior to January 1, 1870, suit was brought on a promissory note which fell due in 1860, and it was dismissed for want of process in 1881, it could not be renewed in six months thereafter. The right of renewal, under the general limitation acts, does not apply to cases which fall within the act of 1869.

April 3, 1884.

Promissory Notes. Statute of Limitations. Before dge Harris. Coweta Superior Court. September rm. 1882.

J. T. & W. H. Reene, for use, vs. Tollerson & Kirby.

Reported in the decision.

W. A. Turner; S. &. A. D. Freeman, for plain error.

ORLANDO McLendon; Buchanan & Brewster; J. Bioby, for defendant.

This was the second suit on a promissory note.

due 25th of December, 1860. The first suit was b

The no

six months from the dismissal of the first.

Jackson, Chief Justice.

on the 25th of December, 1869. The case was missed for want of process in 1881, and that jud was affirmed on the 14th of March, 1882, by this and made the judgment of the court below on the 2 the same month. The second suit was brought on the of August, 1882, within six months from the dismit the first. So that the question below and here is, do limitation of six months within which a dismisse may be brought, under the general limitation provof the Code, fall within the provisions of the act of providing for cases falling due before 1865, the cithe war, or is it not embraced within the act of 1869.

court below held that it is not embraced in it. This has ruled on the question, as did the court below, times, by a majority court twice, and a full court wards. See 47 Ga., 340; 52 Ib., 13; 54 Ib., 494.

So that the able review of those cases by the lecounsel for the plaintiff in error, it is not surprisinfailed to uproot in the mind of this court, as now orgate a principle so deeply planted in our reports. Stare of ought to hold it there forever, we think. The state 1869 is special; it was designed to wipe out these bellum debts; no provision is made for the renewal of

upon them; no exception is made looking to their rewhen dismissed; and upon a special statute of limits

### Arnold vs. Hall et al.

we cannot see how an exception or provision in the general aw can be engrafted; especially where the Code, with that provision in it, is referred to in the special act as applicable to all other cases of limitation of suits, and by necessary implication, it would seem, therefore, not applicable to cases within the special act of 1869.

Judgment affirmed.

## ARNOLD vs. HALL et al.

- . Where, by an order taken at the term when a case was tried, parties were allowed until the third Monday in October, 1882, (which was October 16th) to make out and file a brief of evidence, and nothing was done in the case until October the 20th, it was too late then to perfect the same; and the motion for a new trial should have been dismissed, on motion.
- . No consent of counsel will be enforced unless in writing. Where a parol consent was claimed and disputed, the court could not enforce it legally, but was bound by the rule.

April 24, 1868.

New Trial. Practice in Superior Court. Attorneys. Rules of Court. Before Judge Pottle. Elbert Superior Court. September Term, 1882.

Arnold brought complaint for land against Mrs. Hall. Other defendants were added by amendment. Plaintiff ecovered a verdict. Defendants moved for a new trial, because the verdict was contrary to law, evidence and the harge of the court. This occurred in Elbert superior court, the September term, 1882. The judge passed an order etting the hearing of the motion in vacation on the 3d Monday in October, 1882, during the pending of Oglehorpe superior court. This order provided that, "the lefendants have until the said 3d Monday in October, 882, to make out and file a brief of testimony without orejudice." The 3d Monday in October, 1882, was the 6th of that month. No action was taken in the case at

that time, nor was anything done until Friday, O

Arnold to. Hall et al.

20, when counsel for respondent in the motion mo dismiss it, on the ground that no brief of evidence been agreed upon, approved or filed within the tim scribed by the order of the court. Counsel for m stated in his place that there had been a parol agree between himself and counsel for respondent to po the hearing until Thursday. This was denied by c for respondent, but (as certified by the judge) coun respondent admitted that it was his understanding the case was to be continued from day to day Thursday. There was no written agreement. The heard these conflicting statements, and thinking th ter of continuance immaterial, as there was no Oglethorpe to continue, it being an Elbert county c he certifies, refused to dismiss the motion, approve brief, and granted a new trial. He certifies that the ties appeared to argue the motion on Thursday, O 19, 1882, and by consent it was passed to Friday, w was called, and the motion to dismiss was made as stated.

Worley & Carlton, by J. H. Lumpkin, for plain error.

PHIL. W. DAVIS; H. A. ROEBUCK, for defendants.

Jackson, Chief Justice.

1. The motion for a new trial should have bee missed. The parties were allowed until the 3d Mon October, 1882, to perfect the motion by making of filing a brief of the testimony. The 3d Monday in ber was the 16th of that month. Nothing was until the 20th of the month. It was too late to put the motion. 5 Ga., 333; 59 Ga., 626; Usry vs. Ph. 68 Ga., 815; McCord vs. Harden, ex'r, 69 Ga., 74 Ga., 20.

Dawson vs. Garland.

2. No consent of counsel will be enforced unless in iting. The consent was in parol and disputed. The irt could not enforce it legally, but was bound by the e. 20 Rule Superior Court; Code, §204.

Judgment reversed.

## DAWSON vs. GARLAND.

When a mortgage on personalty has been foreclosed by affidavit, and a counter-affidavit has been interposed and returned for trial, the fi. fa. is mesne process, or in the nature of mesne process, and is amendable.

The levy does not fall by reason of such amendment. Especially not, where the amendment struck out that part of the claim which defendant alleged was illegal.

The court was right in sustaining the verdict for the sum ascertained to be due, after striking out the claim for attorney's fees.

) Whether attorney's fees can be recovered by the foreclosure of a chattel mortgage, is not decided.

April 3, 1883.

Mortgage. Amendment. Practice in Superior Court. idge Stewart. Upson Superior Court. July Term, 1882.

Garland foreclosed a chattel mortgage against Dawson. fi. fa. was issued by the clerk of the superior court, and vied on the property. Dawson filed a counter-affidavit, leging that he had not had his day in court, and pleading flure of consideration. When the case was called for al, plaintiff tendered in evidence the affidavit foreclosing e mortgage. Defendant objected to it on the ground at it contained, in addition to the usual oath to foreclose chattel mortgage, a statement that defendant was instead to plaintiff "\$45.10, attorney's fees." The bill exceptions recites that the court granted an order allowed plaintiff's attorney to strike out these words, and overled the objection to the affidavit; that the same objection was made to the mortgage fi. fa., and the same amendent allowed. The judge certifies that but one order was

Dawson vs. Garland.

taken, allowing plaintiff to write off all in the affidavi fi. fa. in relation to attorneys' fees. This order appe the record as follows:

"It appearing to the court that the fi. fa. in the above state

is proceeding for the sum of \$45.10 attorneys' fees, in addition principal, interest and cost therein stated, and defendant object to said item of \$45.10 attorneys' fees, upon the ground that a gage on personalty could not be foreclosed for attorneys' fees ordered that said item of \$45.10 attorneys' fees be written of that said fi. fa. be allowed to proceed for the remainder."

Defendant moved to dismiss the case, on the grathat the affidavit and fi. fa. having been amended, the fell. The motion was overruled. The jury found for patiff, and defendant excepted.

W. S. WALLACE, for plaintiff in error.

ALLEN & TISINGER, for defendant.

Jackson, Chief Justice.

This case arose on the levy of a mortgage f. fa., a sections 3971-2 of the Code, and a defence thereto, a section 3975. The errors alleged are that the court in allowing the plaintiff to amend the judgment and by striking out the sum of \$45.10 for attorney's fees in not dismissing the levy when this amendment allowed, but after verdict of a jury, ordering the executo proceed for the principal and interest, without the aneys' fees.

1. We see no error in allowing the amendment. It the first trial of the foreclosure of the mortgage on sonal property, on an issue between the parties, and an ordinary affidavit of illegality to a final judgment foreclosure, and for how much? And it was the first timp parties had met, or could meet on that issue. The judgment and fi. fa. and levy were but mesne, or in the new of mesne process, if resisted, to bring the case into contents.

All previous thereto was ex parte. Therefore, the

#### Stewart & Powell vs. Head.

nt, not being final, was amendable. It was really a part the altercation between plaintiff and defendant—plainers declaration, as it were,—and the affidavit of the dedant was his answer, his part of that altercation. Bepleading, it was amendable; and so was the execution conform to it.

- 2. The levy did not fall by reason of the amendment, cause it was the amendment, not of a final judgment or ecution at all, but of proceedings to bring the case into art, if the amount of the foreclosure was too much, or if any other legal reason the foreclosure was illegal. The ry ground on which the ex parte foreclosure was resisted, fore made final, is that it was too much by the fees of attorneys; and yet, strange to say, when the ground sustained and the foreclosure is allowed to become final by by lessening it to the legitimate sum, as contended by defendant himself, he excepts to his own defence, ten it is allowed.
- B. It must follow that the court was right to sustain a verdict of the jury, that the fi. fa. proceed for the sum certained to be due, after striking out the attorneys's, and to enter up the judgment accordingly.

As to whether the court was right in ruling that attorys' fees were not recoverable by foreclosure, we express opinion, because no exception is taken to that ruling, d the point is not before us.

Judgment affirmed.

# STEWART & POWELL vs. HEAD.

LL, Justice, being disqualified, Judge ADAMS, of the Eastern Circuit, presided in his stead in this case.]

If one left a valise in the office of a hotel, without calling attention thereto, and the clerk, without knowing who the owner was, took it into a room where baggage was kept, the landlord would be a naked depositary, and would be liable only for gross neglect, not for ordinary neglect.

The court approached very closely, if he did not actually invade, the right of the jury to determine the question of negligence, in

#### Stewart & Powell vs. Head.

charging that if, under the circumstances stated in the first lande, the valise was broken open and the contents lost, would be authorized to find defendant guilty of ordinary negle

- 3. The evidence was conflicting, and did not require the verdict
- (a.) The presumption is that the court charged the law on all issues correctly; but the presumption is also that the charge tained nothing at variance with that excepted to, unless it stated.

April 8, 1883.

Hotels. Inns. Bailments. Negligence. Charge Court. Presumptions. Practice in Supreme Court. fore Judge Simmons. Bibb Superior Court. April T 1882.

Head brought suit against Stewart & Powell, I keepers, to recover the value of a valise, alleged to been lost by defendants' negligence.

On the trial, plaintiff testified as follows: Was a g of the Lanier House last fall. Came from my room the morning I left, and deposited valise on counter of hotel, and said to the clerk, I would go out in town get the money to pay my bill, if it took me a wee Clerk said they were not in the habit of allo customers to leave without settling their bills. On g out, expected to return, but met a person who had o for me to visit a patient in Dooly county. I then took train-barely had time to do so-and went to see the tient professionally, and returned to Macon in about days or two weeks. I then went to the hotel and ca for valise. The clerk said he knew nothing about it; he would look for it in the baggage room, and four It had been broken open, and contents ta They were of the value of seventy-five dollars. I have check for valise; have it now. I paid bill. Powell w me about bill, and I replied that I would pay it on return to Macon. Didn't tell Woodson, the clerk, valise was not locked. I handed valise to Woodson w I came down that morning, and he gave me the che My room had no lock on it.

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Toodson, the clerk, testified as follows: I am clerk at ier House. Plaintiff came from his room the morning left; said he would send money for his bill on gethome. I replied, "We do not do things that way." said he would go and get money to pay his bill. I told he would have but little time. He said he would reand pay bill. Saw no more of him then. On his rn, he came and called for valise. I said I didn't w he had one, and asked him to walk behind counter point it out. He identified valise in baggage room. said he was sure it was his, on my asking him if he was He said it was not locked when he left it at hotel. ing it up, said it had been broken open. I said I suped not, if it was not locked. He said nothing of anyg being taken but a coat; said nothing about a check or the morning he left; nor did he say anything about ring his valise. I did not know of the valise being left; if he left it he said nothing to me about it. I had no mation of valise being at hotel. There was a crowd at hotel that morning. Don't remember giving plaintiff ieck.

the court charged as follows: "If you believe from the lence that plaintiff left his valise in the office of the el, without calling attention to the fact that he had so it, and the clerk, without knowing who the owner of valise was, took it and deposited it in a room where gage was kept, then defendant is liable as a naked detary, and would be bound to ordinary care; and if, er the circumstances, the valise was broken open and contents lost, you would be authorized to find defend-guilty of ordinary neglect."

he jury found for the plaintiff.

defendants moved for a new trial, which was refused, defendants excepted.

V. A. Lorron, for plaintiffs in error.

USTIN & HALL, for defendant.

Stewart & Poweli va. Head.

JACKSON, Chief Justice.

This suit was brought for the recovery of the conf a valise left by the plaintiff at the hotel of the deant, and from which those contents had been taken. jury found for the plaintiff, and error is assigned a sisted on here, on the denial of the grant of a new tree.

The error insisted upon is the following charge of court: "If you believe from the evidence that plateft his valise in the office of the hotel, without callitention to the fact that he had so left it, and the without knowing who the owner of the valise was, to and deposited it in a room where baggage was kept defendant is liable as a naked depositary, and wou bound to ordinary care; and if, under the circumstathe valise was broken open and the contents lost would be authorized to find defendant guilty of ordineglect."

It is urged that this charge is error, for two reasons: that it does not lay down the law correctly in respective neglect which, under the circumstances put by court, would make the defendants liable; and secon because it took the question of negligence from the and determined it for them.

1. The Code, §2103, declares that "when chattel delivered by one person to another to keep for the uthe bailor, it is called a deposit; the depositary may dertake to keep it without reward, or gratuitously; then a naked deposit. If he receives or expects a re or hire, he is then a depositary for hire; very variant sequences follow the difference in the contract." next section, 2104, declares: "A person may volunt undertake to be a depositary, or he may become so inversity, as by finding; if a naked depositary, he is respected to the contract."

The hypothetical case put by the court, which was in field by the testimony of the clerk, made a case of a made depositary under \$2104 of the Code, and rendered the

### Stewart & Powell rs. Head.

dants liable only for gross negligence, by the same secn. Ordinary neglect is not gross negligence. It is the sence of that care which prudent men take of their own operty. Code, \$2061. So that the court erred in putting e liability of defendants, under those facts on which the arge was based, upon ordinary neglect. Code, \$2063, clares that gross neglect is the want of that care which e of common sense, however inattentive to business, area of his property.

2. Again, we think that the court approached very sely, if it did not actually invade, the right of the jury determine the question of negligence in this charge, is true that the language is "you would be authorized find defendant guilty of ordinary neglect;" but the ect of those words is about the same as to tell the jury at the law, under these facts as stated by the court, these a case of ordinary neglect. 51 Ga., 583.

3. But if the facts required the verdict, then these errors uld not work the grant of a new trial. 51 Ga., 583.

Do they require it? By the plaintiff's evidence they require it; for he swears that he had a check for the ggage, and gave the baggage to the clerk, having been uest and not paying his bill, but leaving with a promise return to pay it; and inferentially leaving the baggage, the the landlord's lien thereon. If such be the truth, he ght to recover.

But if the clerk's statement be the truth, that he did to so leave it at all; that it was not locked, and therefore to broken open; that the plaintiff himself told him that was not; that he did not know such a valise was left at total; then the landlord, having found the valise so left, and total knowing whose it was, and having put it unlocked in the baggage room, would be a mere naked depositary and tuld be liable only for gross negligence; and the question whether or not these facts made gross negligence, should we been left to the jury.

We do not mean to say that they necessarily made such as negligence, or did not, if the clerk's version be cor-

left for the jury to settle, under the repeated ruling this court on the matter of their right to try what make negligence, ordinary, slight or gross.

Of course, as argued by the counsel for defendar error, the presumption is that the court charged the on all other issues correctly; but the presumption all that the charge contained nothing at variance with excepted to, unless so stated.

Expressing no opinion on the merits of the case send it back for error in the charge complained of therefore award a new trial.

Judgment reversed.

Rogers et al. vs. Hopkins & Glenn et al.

[Jackson, Chief Justice, being disqualified, Judge Hammond, of the Atlanta presided in his stead in this case.]

- 1. It is not illegal or against public policy for a guardian to agree the surety on her bond to invest her ward's money, when recein state bonds, and deposit them with the surety, to indemnit against loss as such, there being no other funds in her han cept those to be thus invested; and her attorney, who in goo aids her in attempting to carry out such an agreement, is not if there be a loss of the fund while in his possession, and we fault on his part, before the investment is made. Especithis true where the evidence shows that the failure to mainvestment before the loss of the fund was caused by the father guardian.
- 2. Where an attorney at law collects money for his client and its it in her bank, which is in good standing at the time, name as attorney, he having no deposits there, and exercis control over the fund subsequently to making the depositives her immediate notice; upon a failure of the bank for days afterward, and a consequent loss of the money, she failed to make any demand for it in the meantime:

Held, that there was no conversion of the money by him, and he was not liable to make good the loss.

May 1, 1883.

Attorney and Client. Guardian and Ward. Prin

d Surety. Debtor and Creditor. Banks. Trusts. ablic Policy. Before Judge CLARK. City Court of tlanta. June Term, 1882.

To the report set out in the decision it is necessary to d only the following letter, in which one of the defendts, J. T. Pendleton, gave notice to Mrs. Rogers as to e status of her case prior to the failure of the bank:

"MARCH 31, 1881.

Mrs. Rogers—Dear Madam:

You say in your note of yesterday, that you think you have been ercharged in this matter. It is rather late, it seems to me, to come that opinion. Besides, you fixed the fee; we didn't do it. You d me in July, 1880, that you could not pay us a fee if the case was t, and asked me to see Judge Hopkins and find out if he would not te the case on a contingent fee. I disliked very much to speak to dge Hopkins about it, because I knew he was not in the habit of cing cases like yours on a contingent fee, and consequently put it from time to time. On August 12th, you wrote me a rather authortive note, calling my attention to the fact that I had not seen Judge opkins, as you had told me to do, and notifying me again that you ald not pay us any fee if the case was lost. I replied that we would ce the case for a certain fee of \$500.00 or a contingent fee of oneirth of the recovery. All of this occurred after we had been emoyed, had had a vast amount of trouble in making out the proofs of ath, on account of the number of doctors who had seen Mr. Rogers d their disinclination to make a certificate that would suit us, and d brought the suit. You replied, August 5th, that you had conclud to give us the case on the contingent fee. You had considered e matter. You knew the difficulties in the way. You didn't think could recover, and you made us take the case on a contingent fee. ou have a great many times expressed dissatisfaction that we did t settle the case at \$2,500.00, and once you stated to me that you inted to settle at that amount, and if we did not gain the case you ould hold us responsible for that amount. Besides all this, we got ed of your business, and requested you to let us off and get other torneys, stating that we would not charge you for our services up to at time. At the instance of a friend of yours, I agreed to undertake ur business again, and had great difficulty in getting Judge Hopns to do so. Besides, we have done a great deal of work for you tside of this case, and charged you nothing for it, in effect. The oney is in the bank. Mr. Perino Brown wants to see you about the ildren's portion. Your own you can get at any time.

Yours respectfully,

J. T. PENDLETON."

MYNATT & HOWELL; E. N. BROYLES, for plain error.

HOPKINS & GLENN; J. T. PENDLETON, in propr sonis, for defendants.

Jennie M. Rogers, for herself and as guardian

HAMMOND, Judge.

three minor children, brought suit against J. T. Per and Hopkins & Glenn, alleging that they had be ployed by her as attorneys to bring suit against T tual Life Insurance Company of New York, upon a of insurance upon the life of her husband, and the had recovered judgment and had collected the me said suit, and had failed to pay it over on demand.

The defendants, besides the general issue, filed pleas.

First, they admitted the recovery for the plaicharged in the declaration, but set up that they we tled to one-fourth of the same as their fee, under a contract.

Secondly, they set up the manner and circumsta the payment, as follows: That J. T. Pendleton re

said amount by a draft drawn by the attorneys Insurance Company on their solicitor in New York ble to him as attorney, and forwarded it for collections ame day it was received, to-wit, March 26, 1881, the Citizens' Bank of Georgia. That, as soon as a were received from the draft by the bank, on Mar 1881, he gave notice to the plaintiff of the fact. the plaintiff failed to apply for the money, and the suspended payment on the 13th of April, 1881, where the draft was delivered to it for collection, and it was forwarded for collection through that bank it reason that it was the place where plaintiff did her ness and kept her deposit account. That none of the same was supported to the same and the same and the same and the same account.

fendants kept any deposit account at that bank, b

ep such accounts at other banks in the city. That dendant, Pendleton, drew out the fee due him and his assortes, and the costs, leaving the net amount due the plainf on deposit in said bank. That the money was never defendants' possession, except as thus set out, and was ever in any way mixed with their own funds. That the turns from the draft should have been entered to the edit of said Pendleton as attorney, as the draft was awn to him and indorsed by him in that way, and he ever gave the bank any authority to put the amount to s individual credit, and did not know that it had done so ntil after the bank had suspended payment.

Thirdly, they set up an agreement between plaintiff and efendant, Pendleton, and Perino Brown, president of said itizens' Bank, by which Brown was to sign the bond of the plaintiff as guardian for her children, as security, and sold the bonds purchased by the children's portion of said oney as collateral security against said suretyship, and endleton was to hold the children's portion of the money, then recovered, until the plaintiff determined what bonds would be purchased with their portion, when the purchase would be made, and the bonds held by Brown, he giving the plaintiff a receipt showing for what purpose the bonds here held, and that this undertaking on the part of Peneton was without compensation, and purely for the purpose of enabling the plaintiff to secure Brown against loss security on her guardian's bond.

The verdict of the jury was for the defendants, and the aintiff moved for a new trial, and the error complained in this court is the judgment of the court below over-

ling this motion and refusing a new trial.

The evidence in the record for the defendants, in sup-

ort of their pleas, was substantially as follows:

J. T. Pendleton testified that Mrs. Rogers came to him bring the suit for herself and children on her husband's dicy of insurance, and the question came up as to her ility to give bond as guardian for the children, so as to able her to bring the suit, and the result of it was, with-

out following the evidence through all its details Perino Brown was procured to stand on her bond, and

the money, when collected, was to remain in Pendle hands until Mrs. Rogers instructed Mr. Brown in bonds to invest it, and that these bonds were to be with Mr. Brown as collateral security for his liabili the guardian's bond. He testified further to the co tion of the money and depositing it in the Citizens' H and to all the facts and circumstances, substantially a out in the second plea. He gave Mrs. Rogers notice the 31st of March, as soon as he got a return from draft, that the money was in the bank, that Mr. B wanted to see her about the children's portion, and that could get her share at any time. Mrs. Rogers doe make any substantial contradiction of this version o facts in her testimony. She virtually admits Mr. Per ton's statement to be the truth, as will evidently ap from reading her whole testimony, including that give cross-examination. It appears that she was not sati with the fee they had charged her, and that she went W. Adair's office to advise with him about the matter, two or three days before the bank failed, and that warned her to get her money out of the bank at o giving her to understand that it was not safe to lea there. She did not heed his advice; and when the failed, the money was still there and was lost. It also pears from G. W. Adair's testimony that the very day fore the bank failed she was in his office, and that co erable correspondence took place between her and Pendleton in reference to the matter, and that she with Adair to the bank and had a talk with Brown a it, all the time refusing to apply for the money, on account of her dissatisfaction in regard to the fee. The estimony in regard to the fee charged, was o

The estimony in regard to the fee charged, was of whelming and uncontradicted that it was reasonable fair, and was even less than was usually charged in cases.

Such is substantially the case as it presents itself to this art in the record, and the simple question knows, what he relation of these parties to each other, under the law applicable to these facts?

The plaintiff demurred to the last plea of the defendants, wit, the one setting up the contract between the plainand Pendleton and Brown, by which Pendleton was to d the children's portion of the money, when collected. til the plaintiff and Brown could arrange about the instment of it in bonds, and which bonds, when sered, were to be placed in Brown's hands, to hold as an lemnity against loss by reason of his going security on intiff's bond as guardian for her children. also objected to the introduction of evidence to suprt this plea, and made a written request for the court charge the jury to the effect, that a guardian has no ht to pledge or put the funds of her ward in the custody control of her surety on her guardian's bond, and any ntract to do so is contrary to law and is void, and the orney of the guardian who participates in such arrangeent will not be protected or saved from personal responility for acts or omissions for which he would otherwise responsible.

The court overruled the demurrer, admitted the evince, and refused the written request to charge; and these lings are assigned as error.

1. We do not think that the contract thus pleaded and oved was contrary to public policy, or in any way illegal, d consequently do not think that any blame could in y way attach to Pendleton for attempting to help carry t that scheme, in accordance with his previous underking. On the contrary, it would have been bad faith in m towards Brown not to have done so.

The principle of law requested to be given in charge by unsel for plaintiff is a sound one, but is not applicable the facts of this case. A brief reference to the cases

read in support of the position thus maintained will a plain distinction between them and the case at bar

The case of White vs. Baugh, 3 Clark & Finnelly was where a receiver made an agreement with his ties, in order to get them to go on his bond, that them should be deposited in bank in the name of the sur thereby giving them control over the fund. The held that this was an illegal contract, and that upon ure of the bank the receiver was liable for the loss.

The case of Salway vs. Salway, 2 Rus. and Mylne announces the same principle in the following words: receiver appointed by the court is answerable for the of moneys consequent on the failure of a banker whom they have been deposited for security, if the posit be made in such a way that the receiver parts the absolute control over the fund."

In the case of Forsyth vs. Woods, 11 Wall., 48-court held that an arrangement by which an admin tor was to bring into a partnership, of which he member, the assets of the intestate, and make the acistration of the estate a partnership business, and by they were to share as partners the gains and losses reing from the administration, was against the policy of law.

The case at bar is totally different in principle fro these. Here the scheme did not contemplate that funds of the guardian were to pass into the hands of surety, so as to give him the use and control of the so as to deprive the guardian of her right to exercitely proper control over them, but simply that they were invested in bonds—presumably state bonds, as they the only kind that guardians are allowed to invest and that these bonds were to be deposited with the sunot to be used by him, but simply as a guaranty that would not be misused by the guardian. Such a plan laudable, and would, had it not been defeated by a factor of the bank, have afforded double protection to the work.

surety could not have used the bonds, because they d not have been his; and had he done so, would have guilty of larceny after trust; and the guardian could have wasted or squandered them, because they were ded by the surety.

appears from the evidence that as soon as Pendleton notice that there had been a return from the draft, the had been deposited for collection in the bank of the Brown, the surety, was president, he gave notice rediately to the plaintiff that she could get her share application, and that Brown wished to see her about children's share. This was fourteen days before the re of the bank, and had the plaintiff used proper dilie in carrying out her part of the contract, the invest-the would doubtless have been made in bonds long bethe catastrophe came, and the trust fund would have safe even in the vaults of the broken bank. But she no diligence; and because she did not, the money was

Therefore, it was not error to permit the defendants lead and prove these facts, and it would have been to have given in charge the written request of counfor plaintiff in error, because it was not applicable to facts of this case.

There are many exceptions to various portions of the ge of the court as delivered, and also to refusals to in charge several written requests, which are claimed be counsel for the plaintiff in error to be well taken, use of an alleged violation therein of the legal proport that an agent who collects or receives money for principal, and mingles it with his own funds, or makes posit of it in his own name in bank, without so designing it at the time of the deposit as to impress upon it character and quality of a trust fund, is personally the if there be a loss.

was earnestly claimed by counsel for plaintiff in error the application of this general principle of law to the of this case, would show a liability to the plaintiff by

the defendant, Pendleton, and consequently by the fendants, Hopkins & Glenn, they being jointly bound him to see the money properly paid over to the plant The general charge of the court, which was nearly all cepted to by sections, and the refusals to charge, indicate that the court below did not think that this principlaw was applicable to the facts of this case.

We will first examine the law as cited by counse plaintiff in error, and endeavor to ascertain its true ning, and then apply it to the facts of this case, with a to determining the question of the liability or non-liab of the defendants to the plaintiff.

The principle laid down in Weeks on Attorneys, is, that if an attorney mix up money belonging to his owith his own, he thereby renders himself the clidebtor. Norris vs. Hero et al., 22 La., 605; McAllisto The Commonwealth, 30 Penn., 536, and Robinson Ward, 2 C. & P. 59, were all cases where the agent, and ney or trustee, collected money for his principal mingled it with his own by depositing it to his own in his own bank, and on his own private account; and courts hold, in each of those cases, that by so doin made himself the debtor of his principal, and consequence was liable to him upon a loss of the fund.

In Story on Agency, section 202, it is laid down the money of the principal is deposited in his name is hands of a banker of good credit, and such a deposite according to the common usage of the place, the agent not be responsible for any loss arising from the failuathe banker. In the same book, section 218, it is said, if an agent should improperly deposit the money of principal in his own name in the hands of a banker, should afterwards become insolvent, the loss must be mately borne by the agent. See also 1 Perry on Tresection 443. In 2 Story's Eq. Jur., section 1270, it is down that a trustee, who places money in the hands

anker, should take care to keep it separate, and not mix with his own in a common account, etc.

The case of Sargent vs. Downey, 49 Wis., 524, lays down he same principle, and it will be seen, by reading the facts of that case, on page 527, that while the agent did make a eparate deposit of the fund, yet it was done without the onsent of the principal, either express or implied, and without giving him any notice of it, and the court lay stress on these facts in delivering the opinion.

The case of Ansley & Co. vs. Anderson, Adair & Co., 5 Ga., 8, was where the agent had in hand money belonging to his principal, and upon his principal's refusal to eccive it, made a deposit of it in bank in his own name, fiving the principal notice that it was there subject to his order, and the court held that, upon a subsequent depresiation and loss of the money, the principal could not reover from the agent.

The case of *Phillips*, ex'r, vs. Lamar, sh'ff, 27 Ga., 228, was one in which the court held the sheriff liable where he collected money and deposited it in a bank which failed. The court, however, drew a distinction between that case and the ordinary case where a party selects his own agent, and based their judgment on this distinction, as will be seen by reference to the last two paragraphs of the opinon, on pages 231 and 232.

Let us, then, test this case in the light of the law, as thus revealed to us from the books.

It appears from the evidence that Pendleton collected he money for the plaintiff by receiving a draft payable to his order as attorney, drawn by the attorney of the Insurance Company here, on the New York solicitor, and that he deposited this draft in the Citizens' Bank for collection, indorsing it as attorney, and without giving any instructions as to how the money, when received, was to be credited on the books of the bank. When a return was had from the lraft by the bank, he drew a check in his own name covering the fees and costs, leaving the net balance due the

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plaintiff on deposit. He gave her notice immediately, the date of the letter is fourteen days before the failur the bank. In it he tells her that she could get her part at any time, and that Mr. Brown wished to see about the children's part. The bank was in good stand at the time, and up to the day of failure. The plai herself had a deposit there, and the evidence shows she drew a check on that deposit the very day before failure of the bank. It was not Pendleton's bank, for kept no deposit there, but did keep one elsewhere, and placed the money there because it was her bank, Brown, the president of the bank, was her friend and surety on her bond. The plaintiff never once applied him for the money until after the failure of the ba Pendleton never once did anything that indicated the le desire or intention on his part to exercise any control of that fund, or appropriate it, or the smallest part of it his own use. It was there, and it was hers, and he so tified her. She was wholly at fault, and his conduct above reproach or suspicion; and such being the case the language of the able counsel for the defendant in er "It is not possible, under these facts, that he can be m to pay that money to her."

Such being the view of this case taken by this court is unnecessary to consider the numerous other assignment of error in the motion for a new trial. The verdict is quired by the evidence, and the judgment is therefaffirmed.

Judgment affirmed.

### SINGLETON vs. SOUTHWESTERN RAILROAD.

- A railroad company which has leased its road, cars and enging and allows the lessee company to operate the same in the name the lessor company, is liable to third persons or the public for carelessness and negligence of the lessee company, in the absect of statutory provision to the contrary.
- 2. A corporation has only the power conferred upon it by its char

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Its grants of powers and exemptions are always to be strictly construed, and its obligations are to be strictly performed, whether they may be due to the state or to individuals. A railroad corporation cannot, without special authority of statute, alienate its franchise or property acquired under the right of eminent domain, or essential to the performance of its duty to the public, whether by sale, mortgage or lease.

- 3. The original obligation of a railroad company to the public cannot be discharged, except by legislative enactment consenting to and authorizing the lease, with an exemption granted to the lessor company from liability. Legislative consent to the lease is not alone sufficient. There must be a release from the obligations of the company to the public.
- (a.) In this case the lease itself expressly provides for the continuance of the organization of the lessor company. One of the conditions thereto is that it is to have its president, board of directors, secretary and treasurer. Its corporate powers are exercised and enjoyed under its original charter and the reservations in its lease. It was sued in its corporate name, and in that name appeared and answered; it is recognized under the laws of the state in its corporate capacity; it pleads and is impleaded in none other; it transacts its business through its officers and agents as the Southwestern Railroad; it so dealt with the plaintiff in regard to the very ticket which he bought; and he was not required to look beyond the ticket which conveyed the information that this road was run as railroads generally are, by a chartered company.
- (b.) This case differs from that in 66 Ga., 558, which arose between a non-resident individual lessee and a servant, on account of an injury done by a fellow-servant.
- 4. Where a motion for new trial was predicated on five grounds, and was granted on one alone, thereby overruling the other four, exception being taken to such grant of a new trial by the respondent in the motion, and no cross-bill of exceptions being filed by the movant, so as to secure from this court a direct decision in regard to the grounds overruled, as provided by the act of 1880, we must deal with the judgment granting the new trial and consider it just as it was passed upon by the judge below.\*
- 5. While the damages given by the jury in this case may be high under the evidence, they are not so excessive as to warrant the inference of partiality, prejudice or corruption on the part of the jury, or to require a reversal of the judgment below.

May 1, 1888.

Railroads. Corporations. Leases. Contracts. Dam-

<sup>\*</sup>See 69 Ga., 678, and foot-note thereto; also Letchworth vs. Geo. Railroad. February Term, 1884.

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ages. Negligence. Before Judge Simmons. Talbot perior Court. September Term, 1882.

In addition to the report contained in the decision, only necessary to state that the motion for new trial tained five grounds. The order granting the new trial as follows: "Upon hearing and considering the foring motion, it is ordered by the court, that the verdice set aside and a new trial granted, on the ground that jury found contrary to the evidence and charge of court on special plea which is the second plea."

BLANDFORD & GARRARD, for plaintiff in error.

W. S. WALLACE; PEABODY & BRANNON, for defendence Crawford, Justice.

This was an action on the case brought by the plain error against the defendant in error, and in which was alleged that he purchased a ticket from said defant to ride upon its road from Howard to Geneva and turn; that by the carelessness of the said defendant, the negligence of its agents in putting him off its the was caused to break his leg and suffer other injuri

his great damage, amounting to twenty thousand dollar the defendant pleaded the general issue, and at trial term of the case filed a special plea alleging that fore and at the time of the accident, the road and had been leased by the Southwestern Railroad Compto the Central Railroad & Banking Company of Geometry and that the same were at that time being energic

and that the same were at that time being operate the latter, and not by the former company. Upon the of the issues formed, the jury returned a verdict for plaintiff, assessing his damages at six thousand dol The defendant moved for a new trial, which the organized alone upon the ground that the jury found trary to the evidence and charge on the special plea. It this decision the plaintiff below assigned error, and that the same may be reviewed and reversed.

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, 2, 3. The special plea and the evidence thereunder sent the question whether a railroad company which leased its road, cars and engines, and allowed the ee company to operate the same in the name of the or company, is liable to third persons or the public for carelessness and negligence of the lessee company. t is now a well settled principle that a corporation, bethe creature of the law, has only the powers conferred on it by its charter, and that all others not necessarily olied therefrom are withheld. Its grants, whether of vers or exemptions, are always to be strictly construed, its obligations are to be strictly performed, whether y may be due to the state or to individuals. to be well settled that a railroad corporation, and it with such that we are dealing in this case, cannot, withspecial authority of statute, alienate its franchise or perty acquired under the right of eminent domain, or ential to the performance of its duty to the public, ether by sale, mortgage or lease. 101 U.S. 71; 17 w., 30; 21 How., 441; 4 Biss., 35; 10 Allen, 448. t is not questioned that the Southwestern Railroad npany, if it had been operating its road, would have n liable to respond to the plaintiff in error for any nages sustained by him through the negligence of its

npany, it it had been operating its road, would have in liable to respond to the plaintiff in error for any mages sustained by him through the negligence of its cers or agents. If, then, it would be so liable when trated by itself, does a lease made to another company charge it under the law from such liability?

No case involving this precise question has ever been one this court, but in the case of the *Macon and Augusta ilroad vs. Mayes*, 49 Ga., 355, it was held: "Where a road company permits other companies or persons to reise the franchise of running cars drawn by steam over road, the company owning the road, and to which the has entrusted the franchise, is liable for any injury se, as though the company owning the road were itself using the cars."

This liability is put upon the ground, that " if a railroad apany to which the legislature has granted this fran

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chise permit others to use it, the company is resp to the public for the negligence of such persons." This, then, being a fixed obligation upon a railro

poration, is there any way by which it may allow o exercise its franchise, and absolve itself from such tion? This can undoubtedly be done by the consauthority of the legislature granted to that end. in his works on American Railroad Law 244, and croads 283, lays down the rule as follows: "The cocannot divest itself of responsibility for the torts sons operating its road, by transferring its corporate to other parties, or by leasing its road to them absence of special statute authority and exempt cannot by its own act absolve itself from its obli without the consent of the legislature. The lesse however, also be responsible for the injury."

In support of this principle he cites 26 Vermo which says: "The company owning a railroad will be for the acts of their lessees who run the road. A

liability of the defendants for the acts of their lesse were running the defendant's road under a long le think there can be no doubt. Unless we can h defendants thus liable, they might put their road i hands of corporations or individuals of no respon-It was upon this ground that the English courts der legality of one road leasing itself to another or to persons, and the consequent loss of security to the \* \* \* The without the consent of parliament. can only look to that corporation to whom they have gated this portion of the public service. Certain are not bound to look beyond them, although they less may do so." See also 17 How., 39; 1 Simon 550; 13 L & E., 506; 17 Wallace, 445; 10 Gray

In Railroad Company vs. Brown, 17 Wallace, 4 451, the opinion of Judge Davis is as follows: second assignment of error denies the liability of the second assignment of the

Ill., 109; 4 Cushing 400; 5 Wallace 104.

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ration for anything done while the road is operated by e lessees and receiver.

"It is the accepted doctrine in this country, that a

ilroad corporation cannot escape the performance of any ty or obligation imposed by its charter or the general ws of the state, by a voluntary surrender of its road into e hands of lessees. The operation of the road by the ssees does not change the relations of the original comny to the public, \* \* \* for the servants under ch an employment, in legal contemplation, are as much e servants of the company as of the lessees and receiver. part from this view of the subject, the ticket on which e plaintiff rode, was issued in the name of the Washingn, Georgetown and Alexandria R. R. Company, as were l the tickets sold at both ends of the route. The holder such a ticket contracts for carriage with the company, t with the lessees and receiver. Indeed, there is nothg to show that Catherine Brown knew of the difficulties to which the original company had fallen, nor of the rt performed by the lessees and receiver in operating e road. She was not required to look beyond the ticket, nich conveyed the information that this road was run as ilroads generally are, by a chartered company. e company having permitted the lessees and receiver to nduct the business of the road in this particular as if ere were no change of possession, is not in a position to ise any question as to its liability for their acts."

But it is said that the Southwestern Railroad Company d the consent of the legislature to lease its road, and ving entered into a contract with the Central Railroad d Banking Company, under that consent, it is absolved om its obligations to the public under its original character. Authorities are cited to sustain this doctrine; indeed, me of those hereinbefore referred to are relied upon. The lew which we take of the law and the cases cited is that e original obligation can only be discharged by a legistive enactment consenting to and authorizing the lease,

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with an exemption granted to the lessor company this effect is the rule laid down by Redfield, supr sustained by the authorities he cites. If this be not is but adding a new grant to the original company, out a law being passed to that effect. That the oblicoriginally existed, is not denied, and an examinat the act authorizing the lease to be made, will show no exemption; and without it, we are constrained to hol no such exists.

"The English statute of 8 and 9 Vict. C. 20, section says Redfield, Law of Railways, 616, "gives specia mission to one company to contract with other comp for the right of passage over their track. But an ment between railway companies, without the aut of the legislature, transferring the powers of one con to another, is against good policy, and a court of e will not lend its aid to carry such contract into effect It seems to be considered by the English of that one railway leasing its entire use to another con does not come within this section of the general st and as the public thereby lose the security of the company for care and diligence in the discharge public duties, the contract, unless made in pursuan an act of the legislature, is illegal, as against public po He further says: "But even where such contracts been made by permission of the legislature, it has held, in this country, that the company leasing itself not thereby escape all responsibility to the public. that the public generally may still look to the or company as to all its obligations and duties grow out of its relations to the public, and are cr by charter and the general laws of the state, an independent of contract or privity between the injured and the railway."

In the case of The Ohio and Mississippi Railroad pany vs. Sidney Dunbar et al., 20 Ill., 627, the court "It will be observed that the legislature has been sp

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the enumeration of the powers granted; but in them all nowhere find any, either expressly or impliedly, giving s power to lease their road so as to release them from bility." So we say of the present case; we nowhere d the power given to lease this road so as to release it m liability; and without such a release expressly granted necessarily implied, it does not exist.

We are not unaware of the fact that Maine and Louisiana we taken a different view from that which we hold to be a correct one; but under the construction which this art holds should be given to the chartered rights and emptions of corporations, we are of opinion that it reires not only the consent, but a release by the legislare, to absolve them from the obligations which they owe e public. This was not done.

Besides, in this case the lease itself expressly provides for e continuance of the organization of the Southwestern ailroad Company. One of the conditions thereto is, that it to have its president, board of directors and its secretary d treasurer. Its corporate powers are exercised and enved under its original charter, and the reservations set out its lease. It was sued in its corporate name; it apared and answered in that name; it is recognized under e laws of the state in its corporate capacity; it pleads d is impleaded by none other; it transacts its business, rough its officers and agents, as the Southwestern Railad; it so dealt with the plaintiff below in the very ticket nich it sold him, and, in the language of Judge Davis in e case cited above, he was not required to look beyond e ticket, which conveyed the information that this road is run as railroads generally are, by a chartered comny. If, therefore, the Southwestern Railroad Company es not desire to be held responsible to the public for the ts of its lessees, so far as relates to the public under its arter, a legislative grant to that end should be obtained, d the business of the road conducted in the name and der the responsibility of the lessee company.

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But it is said that the case of Jones vs. The G Southern Railroad et al., 66 Ga., 558, rules this favor of the defendant in error. We do not so underst In that case, there were two questions made and de One was that the leaving a copy declaration and a with a depot agent was not sufficient service on a vidual lessee of a railroad, even though the lease which he operated the road may have been made The other, that Jones, the plaintiff, thority of law. the track hand and servant of the individual lessee not of the Georgia Southern Railroad, the latter wou be bound to answer in damages for injuries alleged t been caused by a co-employé, likewise in the service said individual lessees; and especially when the said did not show himself free from fault. The case at bar is different, in that it arose, not between the lessee con and one of its servants, but between itself, as opera the lessee company in its name, and the public, in t ercise of one of its most important franchises—the portation of passengers.

4, 5. It is insisted by the defendant in error although the grant of the new trial was put by the below upon the ground which we have been considered and that it was not a legal ground, yet if the new tri properly granted upon any of the grounds taken, the judgment thereon should be affirmed. There we grounds upon which the defendant asked the co grant a new trial; the judgment put it upon one spe ground, and that alone, thereby overruling it on the four. That ruling so made, was excepted to, brou this court, and error assigned thereon. No crossexceptions was taken to the overruling of the other gre and which was necessary to have been done in order cure from this court a direct decision upon the que therein made, as provided by the act of 1880. Th having been done, this court must deal with the judge granting the new trial, and consider it just as it was i Singleton vs. Southwestern Railroad,

by the judge below. Under that sound discretion with ch he is invested by law, he held that the defendant not entitled to a new trial, except upon the ground the jury found contrary to the evidence and charge the special plea.

Iaving disposed of that particular ground, we think it essary only to notice that which alleges the damages and to be excessive and unjust.

Jpon this, we say that section 3717 of the Code declares he presiding judge may exercise a sound discretion in nting or refusing new trials in cases where the verdict y be decidedly and strongly against the weight of evice, although there may appear to be some slight eviice in favor of the finding." And again, in section 3718, s declared: "In all applications for new trials on other unds not provided for in this Code, the presiding judge st exercise a sound legal discretion in granting or reing the same, according to the provisions of the comn law and practice of the courts." It has been so long so uniformly held that, after the exercise of this distion by the circuit judge, it will not be interfered with, ept where it has been abused, that it is scarcely necesy to refer to it. In the 1st Ga., 610, it was held that, nis court will not grant a new trial, unless some prinle of law has been clearly violated, or where there is nifestly no evidence to sustain the verdict." It is not tended in this case that there is no evidence to support verdict, but that it is excessive and unjust. guage of McDonald J., in the case of Bryan vs. Acee d., 27 Ga., 91, "we consider the damages given by jury in this case high, under the evidence, but we do consider them so excessive as to warrant the inference partiality, prejudice, or corruption on the part of the y who rendered the verdict." And in the same safe icial line, we quote from Benning, J., in the case of kins vs. Williams, 23 Ga., 224. He says: "The court ow did not think the damages excessive. And the

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court trying the case must ever receive more light question of excessive damages than it can impart other court. The damages may be heavy, but there enough disclosed to this court to satisfy it that th excessive. The boundaries for the amount of dama cases of this kind are anything but fixed."

So that, upon the facts and the law of this case, no legal reason upon which to say that the judge abused his discretion in overruling the defendant's r for a new trial on this ground, and we conclude this ion by adding that which McCay, J., said in the c Kelly vs. The State, 49 Ga., 16:

"The real question in this case is whether this tri

a court of law, composed of three men, not of the vic shall declare the verdict of a jury, chosen by law, as quired and authorized by law to pass on the fact supported by the evidence. We have again and again clared our opinion that this court has no power to a court of appeal from the verdict of a jury. Indeed, it is by a sort of fiction that we have jurisdiction at all of The constitution verdict of the jury upon the facts. pressly declares that this court shall have no origin risdiction, but shall be a court alone for the trials of in law or equity from the superior courts, etc. Th stitution gives to the superior court the right to gran trials in the superior court, on proper and legal ground it is only where the judge of the superior court has, in ing or refusing a new trial, committed an error of la the jurisdiction of the Supreme Court arises."

Judgment reversed.

Hightower et al. ve Cravens et al.

### HIGHTOWER et al. vs. CRAVENS et al.

A plea of former recovery in this case was properly sustained by the court below. Every fact relied upon in the present case was well known to the complainants when the former suit was instituted, and might and could have been pleaded and insisted on in that suit.

The decree allowing a redemption of the land upon payment of the purchase money, was authorized by the prayer to that effect in defendant's answer, which, in that respect, was properly treated as a cross-bill.

Although the purchase money notes had been transferred, the defendant in the bill appears to have been bound as indorser of them, and his answer stated that the person holding them was willing to become a party, and gave the complainants such information as would have enabled them to bring in the holder of the notes and protect themselves in respect to him.

) Moreover, the exception to the decree is general, and does not set up a specific objection to that portion of it which required the money to be paid to defendant.

April 17, 1883

Res adjudicata. Decrees. Vendor and Purchaser. ormer recovery. Before Judge FAIN. Catoosa Superior ourt. August Term, 1882.

Oppar L. Allen and Lula J. Hightower (minor children Mrs. Martha J. Allen, deceased) filed their bill, by next end, against B. W. Allen and J. R. Cravens, alleging, in ief, as follows: On October 20th, 1877, their mother ade a trust deed conveying to defendant, Allen, in trust r them, certain land in Catoosa county. The deed conined the following power of sale:

And I, the said Martha J. Allen, hereby clothe the said B. W. len, trustee as aforesaid, with full power to sell without any order, rection, control or supervision of any court, such portions of the operty hereby conveyed as he may deem to the interest of the benciaries herein named, and to reinvest the proceeds of such sales such property as he may deem advisable. Said proceeds of sales d said reinvestments to be held by him, said B. W. Allen, to and the uses hereinbefore mentioned."

This land was worth some three thousand dollars. Cra-

Hightower et al. vs. Cravens et al.

vens, with full knowledge of the trust, entered into a tract with Allen, the trustee, which was a species of and reinvestment by the latter. By this contract A bought from Cravens certain other land at the price of thousand dollars, and in part payment therefor, as trus conveyed the trust property to Cravens, estimating i twenty-seven hundred and fifty dollars. Allen took a b for titles for the land purchased by him as trustee for co plainants, but gave his individual notes for the unp portion of the purchase money. Complainants claim t they are entitled to a deed from Cravens for so much the land as was paid for with their trust property, untra melled by the trade between Allen in his individual pacity and Cravens, as to the remainder of the purcha The purchase money notes of Allen being unpaid, C vens has brought ejectment for the land against compla The bill waives discovery and pra ants or their tenants. that the ejectment suit be enjoined; that Cravens decreed to make to them a deed for so much of the la as was paid for with their trust property, leaving him a Allen to settle between themselves as to the remaind for subpœna and general relief.

Cravens pleaded former recovery, and also answered to bill. The record of the case pleaded in bar showed to the same complainants had filed a former bill again Cravens and one Fuqua. In it they alleged substantiate the same facts set out above, and also that their trust preerty was worth about three thousand dollars, while to purchased of Cravens by Allen was not worth any more if as much; that the gross disproportion in prices set up the property in the trade was itself an evidence of fraund there was also positive fraud; that the contract word, being a private barter of the trust property and effort to create a lien on the trust estate, which was a permitted by the deed and was contrary to law; that Allewas insolvent, and the place purchased by him would bring enough to pay Cravens the balance of his purchased.

Hightower et al. vs. Cravens et al.

oney; that Cravens had made some kind of trade with e Fugua for the purpose of selling to the latter the trust operty acquired from Allen, all parties having notice of e trust. The prayer was that the sale by Allen, trustee, Cravens be set aside, and the deed made in pursuance ereof be cancelled as a cloud on the title; that, if this uld not be done, Cravens should be held liable for the lue of the trust property; that the trust funds should be lowed into the hands of Fugua, and a lien be declared the land sold by Cravens to Allen and on the indebtness of Fugua; that, Fugua and Cravens should not spose of the land or purchase money notes or make furer payments between themselves; and for subpæna and neral relief. The only part of Cravens' answer to this Il which is material here is, that he stated therein that e of Allen's purchase money notes had been negotiated, fore the filing of the bill, to a purchaser for value and thout notice, who owned them at the date of the answer. On the trial of that case, the jury found the following rdict: "We, the jury, find for the defendant;" and a cree for costs was entered against the plaintiffs. as the suit pleaded in bar of the present case.

The answer of Cravens to the present bill alleged that e purchase money notes of Allen were still due and apaid, and that the party holding them was willing to me in as a party to this bill and have his rights adjucated. Defendant prayed a decree requiring complaints to pay the balance of the purchase money within a asonable time, or, in default thereof "that all the right, le or interest they may have in the said land purchased on respondent, as set out in complainant's bill, either in wor equity, be forever barred and foreclosed."

By agreement, the case was submitted to the chancellor thout a jury. He decreed that the former suit was a to the present bill, and that defendant, Cravens, should cover of complainants and their tenants the land for hich ejectment had been brought, unless complainants

Hightower et al. rs. Cravens et al

should pay to him the balance of the purchase money va a specified time; in which event, Cravens should make to them. Complainants excepted, and make two ques

- (1.) Was the former a bar to the present suit?
- (2.) Was the latter portion of the decree correct?

J. H. Anderson; E. D. Graham; McCutchen &

MATE, for plaintiffs in error, cited Freeman on ments, §252, 253; Herman on Estoppel, §§75, 80-9; 6495, 589; 7 Id., 434, 437; 19 Id., 413; 56 Id., 520, 2 Kelly, 413; 65 Ga., 638; 61 Id., 662; 48 Id., 55 Id., 180; 46 Id., 282; 53 Id., 257; 54 Id., 212, 69 Id., 29; 10 Id., 429; 2 Kelly, 383; Code, §§2329;

Story's Eq. Jur., 1257; Perry on Trusts, 467.

R. J. McCamy, for defendants, cited 5 Wallace, 50 Otto, 351, 364-6; 1 Kelly, 136; 2 Id., 325, 275; \$3577 and citations; 65 Ga., 283; 55 Id., 228; 63 Id. 40 Id., 493, 67; 34 Id., 47, 499; 62 Id., 598; 63 Id. 66 Id., 545; 43 Id., 564; 4 Id., 569; 45 Id., 100; 4 564; 66 Id., 545; Freeman on Judgments, \$159; Bi on Estoppels, 154, note 1; 2 Bos. & P., 71; Herm.

Estoppel, §\$77, 81, 84, 90; 2 Ga., 383.

# HALL, Justice.

1. The plea of former recovery, set up in this case properly sustained by the court below. Every fact a upon in the present case was well known to the compants when the former suit was instituted, and migh could have been pleaded and insisted upon in that In Smith vs. Hornsby, decided at this term of the call the questions made in this case were fully considered and examined. There as here, the facts were known

we held that, if relied upon for one purpose, though pleaded or not set up at all, and the party failed to Hightower et al. vs. Cravens et al.

proper legal use of them, he was nevertheless bound by ne decree rendered in the former case.

2. The decree rendered in this case, allowing the de-

endants to redeem the land, upon payment of the purhase money, was authorized by the prayer to that effect ound in defendant's answer, which in that respect was oubtless treated by the chancellor as a cross-bill, and we nink properly so. It is true that the notes for the purhase money had been transferred to and were then held y another person, who was no party to the suit, though he answer distinctly states that he was willing to become party, and the decree directs the payment to be made to he defendant who, it appears, was bound as indorser of he notes. If it was the purpose of the complainants to ecome the owners of this land, and they were ready and villing to comply with the terms of the purchase, they ould easily have protected themselves by making the older of the same a party to the suit. Though apprised n ample time, of his interest in the matter, they neither ought to make him a party nor do they appear at or before he hearing to have taken steps for their protection in this espect, nor did they then make and insist upon any obection to this feature and purpose of the answer. Even now, their bill of exceptions sets up no specific objection o this portion of the decree. The exception to the decree s general and goes to its entirety. If they have suffered by its terms, their loss is attributable to their own neglect, and they must abide the consequences. It is quite apparent ent that, if a wish had been intimated, upon their part. hat they should pay to the holder of the notes, it would have met the concurrence of the defendant, whose answer placed them in possession of all needed information as to he holder of the notes, and also informed them of his villingness to become a party, if they chose to make him one. It was not in the power of the defendant to do this, but so far as concerns the complainants, there was no obtacle, legal or otherwise, to their doing so.

Judgment affirmed.

Temples vs. Temples et al.

### TEMPLES vs. TEMPLES et al.

[This case was argued at the last term, and the decision reserved.]

Where two parties exchanged tracts of land, and each took pose of the tract received by him, the fact that some three thereafter, but before deeds were passed, one of the parties exchange received notice that his vendor had previously portion of the exchanged land by parol and had received put therefor, would not affect his title, nor would equity set asic exchange or prevent its consummation by the passing of details.

(a.) After a purchaser of land has paid therefor and taken post thereof, he has a perfect equity on which he could base an of ejectment or defend against one, although no deed made been executed, and equity will not subject land so purch the claim of one who holds an older equity of which no noting given until after the purchaser had bought and taken possible february 18, 1883.

Title. Equity. Notice. Before Judge Pottle. Superior Court. March Term, 1882.

Reported in the decision.

JOHN P. SHANNON; F. B. HODGES, for plaintiff in er

J. H. SKELTON; A. G. McCurry; S. Reese, for do ants.

HALL, Justice.

The defendants, M. D. C. Temples and Matthew changed lands with each other, the former giving t latter seventeen acres of land for fifty acres. Immed upon this exchange, each took possession of the la acquired from the other. The complainant had pure and paid for five acres of the seventeen exchange Temples with Matthews, prior to said exchange, bu never in possession of any portion of it, and had no veyance thereto. The transaction between him and ples was verbal only. Some three months after Mat

#### Temples re. Temples et al.

went into possession, but before he received any conveyance from Temples, or Temples had received a conveyance from him, the complainant notified Matthews of his claim to this five acres, a part of the tract he had obtained from Temples, insisting that he should not consummate the contract by receiving a deed to the land from Temples, and that he should make no deed to Temples for the fifty acres thus exchanged with him. He refusing to comply with this demand, the complainant brought this bill to compel a specific execution of his contract with Temples for the five acres of land which he had bought and paid for; he insisted that the notice to Matthews, before the making of the conveyance to him by Temples, of his equity to the land in question, entitled him to the relief prayed as to said five acres of land.

On the trial, the court charged the jury, "that if Matthews and Temples exchanged lands, and Matthews took possession of the seventeen acres and Temples took possession of the fifty acres, and at the time of the exchange and transfer of the two possessions, Matthews had no notice of the claim of complainant to the seventeen acres, under his contract with Temples, his title is good, although he might have known of the equities between complainant and Temples at the time he took the deed; that an innocent purchaser for value, without notice of an equity, takes free from the equity; but that if Matthews had notice of complainant's claim before or at the time of his verbal purchase and the exchange of the possessions of the two parcels of land, then he acquired no title to the seventeen acres, and his present possession was that of Temples, as to this complainant."

His honor refused, at the request of complainant's solicitors, to charge that, if Matthews had notice of complainant's claim before he had completed his trade or swap with Temples, then he took his deed subject to complainant's claim, and also refused a further request to charge that, if Matthews had notice of complainant's claim on the land in dispute before he parted with the title to his land

Temples vs. Temples et al.

to defendant Temples, he cannot set up his title as fence against complainant's claim.

The jury found for the defendants, and the complainade a motion for a new trial, setting forth, among grounds, the foregoing charge and refusals to charge. motion was refused, and these grounds alone were incupon here for a reversal of the judgment.

The charge, as given, states the law correctly, a directly applicable to the facts in evidence; if this rehad been given to Matthews before he took possessithe land he got from Temples by the exchange, an

fore Temples went into possession of the land he got Matthews, then the requests of complainant would been proper and the charge of the judge would have It would be difficult, if not impossible, to a case where the entire purchase money had been and possession had been taken before the notice was a in which the purchase would not be deemed bond See 29 Ga., 485. None of the cases cited by the pla in error go to this extent. Take as an instance that from 7 Johns. Ch., 67, where it is said that the "pays were made, not only after the pendency of the suit, was notice in law, but after actual notice of the plain claim must be taken to have been received. They were fore payments made by the defendant in his own w and his character of purchaser will not protect him plea of a purchase for a valuable consideration, wi notice, must be with the money actually paid; or els cording to Lord Hardwicke, you are not hurt. The ment must be, not only that the purchaser had not i at or before the time of the execution of the deep that the purchase money was paid before notice. '

"A purchaser bona fide, without notice of any defect title at the time of the purchase, may lawfully bu statute or mortgage, or any other incumbrance, and

must not only be a denial of notice before the pure but a denial of notice before the payment of the mo Temples vs. Temples et al

n defend himself at law by any such incumbrances ught in, his adversary shall never be aided in a court of uity, by setting aside such incumbrances: for equity ll not disarm a purchaser, but assist him; and precedents this nature are very ancient and numerous, viz: where a court has refused to give any assistance against a puraser, either to an heir, or to a widow, or to the fatherse, or to creditors, or even to one purchaser against anther.

The maxims of the common law which refer to deents, discontinuances, non-claims, and to collateral warnties, are only the wise arts and inventions of the law protect the possession and strengthen the rights of purasers." 18 Viner's Ab., 112. Nor is our own law less indful of this high duty to innocent purchasers, or less licitous and careful about the protection it affords them. ode, \$\$2640, 3092, 3119, and the many cases referred to ader each of these sections.

Matthews, by reason of his purchase and possession, and e payment in full of the consideration, could have dended himself against an action of ejectment, brought by e party holding this naked legal title. 3 Ga., 5; 10 Ib., 10-1; 21 Ib., 150; 25 Ib., 648. And he might also have aintained the same action against any one disturbing his essession, notwithstanding the fact that this legal title as outstanding in another. 54 Ga., 192; 57 Ib., 416; 55 c., 81. His equity to the title and to have a conveyance the same was perfect, and entitled him to a decree vesting the title in him; although his contract existed only in arol, full payment alone, accepted by the vendor, or parall payment accompanied with possession (Code, §3187), bould be sufficient for that purpose.

In this case, there is full payment accompanied by possion, for about three months before any notice whater was given of the equity set up by the complainant to part of the land.

Judgment affirmed.

Felker vs. Crane, Boylston & Company.

# FELKER vs. CRANE, BOYLSTON & COMPANY.

The only effect that the legislation of congress has upon the property reserved as a homestead, is to prevent its passion assigned in bankruptcy, and thus to withdraw it from the tion of the bankrupt court, leaving it where it was before ceedings in bankruptcy were commenced, and depriving to of the power of administering it as a part of the estate of the rupt. The title does not vest for the use of his family

bankruptcy is subject to a debt contracted by the debtor discharge.

(a.) In the case in 65 Ga., 624, the levy was made for a tracted since the passage of the homestead act, but which before the commencement of the bankruptcy proceedings.

state law has been complied with. Therefore, an exem

Bankruptcy. Homestead. Liens. Debtor and C Before Judge Erwin. Walton Superior Court. Term, 1882.

In 1875 Felker was adjudged a bankrupt, and charged in 1876. His assignee set apart to him land as an exemption, and the same was allowed court. No proceedings were taken to have a hoset apart by the ordinary. In 1881, the firm of F. Company gave certain notes, and on failing to pathey were reduced to judgment, and a levy was the land set apart as an exemption by the bankrupt.

Felker claimed it on behalf of his wife and childre The case was submitted to the court without a juheld the property subject, and the claimant excep

JOHN W. ARNOLD; H. D. McDANIEL, for plainerror.

WILLIAM J. RAY, for defendants.

HALL, Justice.

March 13, 1883.

Is a homestead, allowed by the laws of this state

Felker vs Crane, Boylston & Company.

ad of the family, and recognized by the bankrupt laws congress, which has been set apart by the district court the United States to one adjudged a bankrupt, liable a debt he has contracted after his final discharge, where has failed to have it assigned by the proper state courts, the manner prescribed by the constitution and laws of e state?

The only effect that the legislation of congress has upon e title to the property reserved as a homestead, is to event it from passing to the assignee in bankruptcy, and us to withdraw it from the jurisdiction of the bankrupt urt, leaving it where it was before the proceedings in inkruptcy were commenced. This tribunal is deprived ereby of the power of administering it as a part of the tate of the bankrupt. In re Bass, 3 Woods' R., 382, per radley, Circuit Justice. So in Bush vs. Lester, 55 Ga., 1, the same principle is announced in this clear and exicit language: "The assignee acquires no title, and imarts none to the bankrupt. He admeasures, or values, d allows the bankrupt to retain. The latter has presely the same title after his exempt property has been t apart as he had to it before." Farmer vs. Taylor et al. nounces the same principle, and deduces therefrom the nclusion that "land set apart to the bankrupt by his signee as exempt, does not vest in his wife or family, nless the local law is complied with in respect to platting and recording the plat in the proper office of the county. his may be done before or after the proceeding in bankptcy; but until done, the bankrupt may convey, free om any claim by his wife or children." 56 Ga., 559; 7 Ib., 349; 59 Ib., 763.

Nor does Ross vs. Worsham, 65 Ga., 624, contain, was supposed by counsel for plaintiff in error, anything variance with the foregoing cases, or any modification of the principle they announce. There the exertion that was levied issued from a judgment on a judgment of the created since the passage of the homestead act to arry into effect the provisions of the constitution of 1868,

Lewis et al. vs Board of Commissioners of Roads and Revenues of Gordon Co.

but which existed before and at the time of the commencement of the proceedings in bankruptcy. The land was set apart as an exemption, and the levy was then made and the claim interposed by the bankrupt, in his own rightand not on behalf of his wife and children. Under the circumstances, this court held that it was not subject to the execution, and that a resort to the state courts was not necessary to a consummation of the exemption in favor of the claimant. Crawford, J., delivering the opinion of the court, is careful to guard against any such misapprehension as has happened in the present case. He says: "Nor are we to be understood as deciding any question beside that made by the record, which is, that when an exemption is granted by the judge or by the register in bankruptcy, that the same is no more subject to levy and sale than if it had been set apart by the ordinary having juris-What title he takes, or what interest diction thereof. therein, if any, his wife and children may have, is not in this case, and is, therefore, not decided." It had, on divers occasions before then, been decided, if not in express terms, at least by implication, that they took no interest which could be recognized by the courts, until the homestead had been set apart for their benefit, under the laws of the state.

Judgment affirmed.

Lewis et al. vs. Board of Commissioners of Roads and Revenues of Gordon County.

<sup>1.</sup> Where a case was referred to an auditor, who reported thereon in favor of the plaintiff, the report was accepted by the court, and opportunity given to all parties to except, if they failed to do so within the time prescribed by the order, or having excepted there was a finding against them, the judgment should have been entered in favor of the plaintiff upon the report.

<sup>(</sup>a.) Two fi. fas. were issued against a county treasurer and his sureties, for his default in paying over taxes. The treasurer and his sureties separately filed affidavits of illegality to each of these fi.

Lewis et al. vs. Board of Commissioners of Roads and Revenues of Gordon to.

fas., and the cases were returned to the superior court. The affidavits of the principal and sureties were attached to the fi. fas. to which they were respectively applicable; and the two cases were entered on the docket. Both cases against principal and sureties were referred to an auditor, to take the account between the treasurer and the county. A report was made in each, finding the amounts due on each respectively; and leave was given to except thereto. The principal alone excepted, and his exceptions were disallowed:

- Held, that the sureties were parties to this proceeding, and were bound as to the amounts so found. A suit admits of various defences by all or each of the defendants, but each separate defence does not make a new and distinct suit.
- b.) It makes no difference that the sureties did not appear before the auditor or except to his report, if they had an opportunity of doing so.
  - Where the bond of a county treasurer was absolute on its face, and it did not appear, either from it or any other writing prior or contemporaneous therewith, that it was left with the ordinary on condition, after breach of the bond by the principal, the sureties could not set up by way of defence, and establish by parol, that when they signed the bond and left it in the hands of the officer authorized to receive it, they stated to him that they were not to be bound until other sureties, whom they named, had also signed. And especially is this the case where several years elapsed, during which the sureties failed to inform themselves, or even make inquiry as to whether such condition had been performed, and where, in consequence of the bond thus made, their principal received his commission as county treasurer, and received the public revenue for which he failed and refused to account.
  - Section 2693 of the Code, which provides that possession of a deed by the grantee is presumptive proof of its delivery, which may be rebutted, must be construed with other sections in pari materia; and so construed, it was the purpose of the Code to relax the old common law rule which made possession of a deed conclusive evidence of delivery, so as to reach the case of a party whose conduct is purposely fraudulent or will effect an unjust result.
- It is the duty of the governor to take the bond of a county treasurer, administer the oath of office, and thereupon deliver his commission to him. Not being able to attend to these details in person, he may by his dedimus potestatem devolve this duty upon one of the officers of the state authorized to administer oaths. The power of such officer is specified and limited; and inasmuch as it grows out of the laws of the state, the sureties signing the bond are conclusively presumed to know its extent. The law enters into and becomes a part of such contract as effectually as if set

Lewis et al vs. Board of Commissioners of Roads and Revenues of Gorde

out therein. The consent of an officer acting under such de potestatem to stipulations beyond this grant of power, would excess of his authority and void.

- 5. To permit these sureties—after the bond has been executed returned, and the commission issued to their principal, what acted under it, and received and failed to account for the revenue—to set up, as a defence to a proceeding founded on default, that they stated to the ordinary who took the bond they would not be liable till certain others signed it, would allow them to take advantage of their own wrong. They a
- (a.) It is not claimed that the alleged conditional execution bond was ever made known to the governor; nor will we pre that he would have illegally approved such an arrangemen he known it.

April 10, 1883.

this was done.

topped from so doing.

Auditors. Parties. Res adjudicata. Practice in perior Court. Bonds. Officers. Contracts. Prin and Surety. Estoppel. Before Judge BRANHAM. don Superior Court. August Term, 1882.

To the report contained in the decision it is necessal add only the following: One ground of the affidabillegality filed by the sureties to one of the execution as follows:

"That at the time the pretended bond of J. H. A

was signed by them, and before it was left with I Neal, the ordinary of said county, they distinctly no said ordinary that they had signed the same on the c tion and understanding that the bond was not to be delivered or considered or accepted by him as the bos said Arthur, until Joseph J. Printup and W. J. Fuller signed said bond as co-sureties with deponents of the Arthur; and the instrument was left with the said that said co-sureties might sign the same, and said ordinare was so notified, and directed not to accept the said in ment as a bond, or consider it binding on deponent

and the instrument sued on was never delivered as

This condition was never complied

wis et al. rs. Board of Commissioners of Roads and Revenues of Cordon Co.

nd, and they never have at any time waived the condion insisted on at the time, as above set out."

The affidavit filed to the other execution contained subantially the same ground. The defendants offered parol stimony in support of this ground, and the following lloquy between the counsel and the court occurred:

THE COURT.—" Now, gentlemen, you propose to prove by these tnesses, the defendants and E. D. Hudgins, as I understand, that ten the bond was made, sometime in the early part of 1873, accordig to the date of the bond,—with the explanation of the ordinary, the 18th of February of that year, these parties signed the bond in the essence of the ordinary, and left it with him, and stated at the time at they were not to be bound by it, or that it was not to be the 18th of Arthur and the defendants until W. J. Fuller's and J. J. intup's names were inserted in the bond and it was signed by them 18th of 18th

MR. McCamy, of counsel for defendants.—"That is our position. e offer to show by Pulliam and Lewis and Hudgins, that the facts ated in the illegality as amended, are true."

THE COURT.—"At the same time, you do not deny that you signed e bond in the presence of the ordinary and left it there with him." Mr. McCamy.—"We do admit it was done in his presence."

THE COURT.—" And you left it then with the statement that you build not be bound by it until it was signed by these parties?"

Mr. McCamy.—" Yes, sir."

THE COURT.—"I will rule it out."

Mr. McCutchen.—"It was not delivered as our bond."

THE COURT.—"That is your conclusion."

MR. SHUMATE.—"Mr. Lewis desires to state that bond was never it of the hands of the ordinary, and was not taken out by Arthur by any one else, but remained there for the purpose of getting the her sureties to come in and sign it."

THE COURT.—"That appears in the evidence before me, and is one cound upon which I base my decision."

The jury found a verdict in favor of plaintiffs, judgment as entered, and defendants excepted.

McCutchen & Shumate; R. J. McCamy, for plaintiffs in error.

E. J. KIKER; W. K. MOORE, for defendants.

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HALL, Justice.

Two fi. fas. were issued against the county treasurer of Gordon county and his sureties, for his default in paying over the taxes due to the county in the years severally set forth in each of them. To these ft. fas. the tax collector filed affidavits of illegality, and the sureties also filed such affidavits. The affidavits of the principal and sureties, made separately, were alike in all respects, except that there was one ground in the latter which was not in the The fi. fas. and affidavits were returned to Gordon superior court. The affidavits of the principal and sureties were attached to the ft. fas. to which they were respectively applicable, and the two cases were entered upon the proper docket. Both cases, against principal and sureties, were referred to an auditor, to take the account between the treasurer and the county. The auditor made his report in each, and found the amounts due on each respectively. This report was returned and allowed by the court, and leave was given to except thereto. county treasurer alone excepted, and his exceptions, after a proper hearing, were found against him and disallowed. Then the report was made the judgment of the court. When these affidavits of illegality came up for a final hearing, the counsel for both parties agreed to submit to the judge the determination of the point, both upon the law and the facts as above substantially set forth, whether the report of the auditor and the judgment thereon were conclusive upon the sureties as to the amount found. The court determined that they were concluded thereby as to that fact.

1. The correctness of this ruling depends entirely upon the fact of the sureties being parties to the proceeding before the auditor; for it cannot be denied that if they were, and his report was returned and accepted by the court, and an opportunity was given to all the parties to except, and they failed to avail themselves of the privilege within the wis et al. vs. Board of Commissioners of Roads and R venues of Gordon Co.

ne prescribed by the order, or having availed themselves ereof, there was a finding against the exceptions, then, either event, judgment should have been entered in favor the plaintiff upon the report. Code, §§3137, 3138, 3140, 97, 3097 (d), 4203, and cases cited under each in Code 1882.

It is said, however, that the evidence before the judge low did not authorize his conclusion that the sureties ere parties to the reference to the auditor and the proedings before him, for the reason that they set up dences to the fi. fa. separate from those made by their incipal; that the clerk entered but two cases on the ocket, when he should have entered four. We are of a difrent opinion. There were only two ft. fas. to which affidaits of illegality were filed. The sureties were parties to these . fas., and the ft. fas. were the foundations of the suits reirned to the court. That a suit admits of various deences, joint or several, by all or each of the defendants, ill not be questioned; but we have yet to learn that each eparate defence makes a new and distinct suit. We know f no such practice, and feel assured that neither law nor recedent can be found to justify it.

It does not matter that the sureties did not appear beore the auditor, or that they did not see proper to except
o the report. It is sufficient that an opportunity was
afforded them to do both, and if they neglected to avail
hemselves of it, and chose to rely upon their principal
o make defence for them, the consequences of their
neglect should not be chargeable to the plaintiff. Besides,
one of the purposes of the reference and report was to
settle, by a single proceeding, the very question which
they were seeking to open, and thus to avoid two investigations into the account. In addition to this, they did
not attempt to show by any specifications in their pleadings, after the report was made and accepted by the court,
any error in the amount found by the auditor.

2, 3, 4, 5. The next question we shall consider is whether

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a condition or stipulation, not appearing in the bond or by any other writing contemporaneous with its execution, or at any prior time, to the effect that, when the sureties signed said bond and left it in the hands of the officer authorized to receive it, they stated to said officer that they were not to be bound until other sureties, whom they named, had also signed the same, constitutes a defence, which can be established by verbal testimony, and which will relieve them from liability upon their obligation; especially after a lapse of several years, during which time, so far as appears, they have failed to inform themselves, or even to make inquiry whether said condition has been performed, and when, too, in consequence of their obligation thus made, their principal received his commission as county treasurer, and under it received the public revenue, which he has squandered, and for which he utterly fails and refuses to account to the proper authorities. The court below held that the defence could not be established by this species of evidence; and we think this decision was according to law and sound policy.

It was not denied in the argument that a condition could not be added or annexed by parol testimony and made a part of so solemn an instrument; but it was urged that the defence went to and denied the execution of the bond: and if not strictly and technically so, it was in effect a plea of non est factum,—the bond was not in fact delivered, nor was it intended by them as a delivery, either absolutely or conditionally; it was certainly not an escrove. because its execution was incomplete and it was not placed in the hands of a third person to be delivered to the obligee when the condition upon which it was to take effect had been complied with; and finally, that the transmission of the bond to the department having control of it, before the condition upon which it had been left with the ordinary had been fulfilled, and the other securities named had signed it, operated as a surprise and fraud upon them.

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From what occurred, as well as from what appears upon he pleadings and from defendants' offers of proof, we are not authorized to impute bad faith or fraud to this agent of the government, who was a public functionary, and whose duties in this behalf were accurately defined by law and were necessarily supposed to be as well known to hem as to the agent himself; in fact, all persons are charged with a knowledge of the law, and are bound, at heir peril, to take notice of its provisions. We have seen he allegations of this third ground of the affidavit of illegality; and all that these defendants proposed to establish by parol testimony was the facts therein set forth, and hese facts go only to the extent of showing that it was the inderstanding of the affiants that the bond was not to be considered as delivered, and that they were not to be bound until it was signed by the other securities named by them, and that he had notice of this arrangement; but they neither allege nor offer to prove that he consented to hold this bond or to accept their execution of it upon the condition mentioned, or that he gave them any reason to believe that he would do so. In the absence of this controlling fact, it would be going very far to presume that he misled them, either by word or act, or that he was under any promise, either expressed or implied, to carry out the arrangement made among themselves; the presumption, on the contrary, is that he declined to place himself in the inconsistent attitude of representing parties whose interests might conflict and possibly lead to a failure on his part to keep faith with one or the other. Without a distinct agreement with him that he would observe and carry out the arrangement among themselves, they should have withheld their signatures to the bond until those they desired to sign had done so, or at least until they were well assured that they would join them in the obligation. It is not intimated, nor can we discover from anything contained in this record, that the persons named as additional securities had ever been consulted, or had

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ever given them assurances that they would become

to this obligation. They seem to have proceeded upon the expectation or hope that they would do upon any well grounded assurance to that effect. we are reluctant to impute to them a design to mi entrap the ordinary, or to suggest the possibility resorting to a device to escape liability after affixisignatures, rather than forfeit the friendship of the cipal by refusing to become his bondsmen, still, it to us that their conduct was so loose and incaution excite suspicion that their intentions were neither nor fair.

We cannot recognize the ingenious and subtle tions made by their able and indefatigable couns do so would be to evade or overthrow rules which perience and wisdom of ages have devised and stri ministered for the protection of property and the of rights, both private and public; and for that there is none more effective than that which forbid ations or additions to be made to writings delibera ecuted and placed in the hands of a party who from their terms to be entitled ultimately to their An escrow, which is a deed delivered to and be by him delivered, on certain conditions, to the is a seeming rather than a real exception to the Code, \$2693. While the same section of the Co vides that possession of the deed by the grantee sumptive proof of its delivery, which may be rebu is silent both as to the character of the evidence by this is to be done, and the circumstances which wi come the presumption. This must be construed wit portions of the Code having relation to the subject, §2757, subdivision 1, which declares in express term parol evidence is inadmissible to add to, take from, a written contract, and §3809, which prohibits a absolute on its face and accompanied with posses the property, from being proved at the instance ewis et al vs. Board of Commissioners of Roads and Revenues of Gordon Co.

arties, by parol testimony, to be a mortgage only, unless and in its procurement is the issue to be tried, and §3762, hich declares written evidence of higher proof than oral, and in all cases where the parties have reduced their conact, agreement or stipulation to writing and assented tereto, the writing itself is the best evidence of the same. It, however solemn may be the form and character of a ritten instrument, parol evidence is always admissible to now that it was either originally void or has subsequently ecome so. Ib., §3802. These provisions of our Code are, ith few exceptions, declaratory of well settled common law ales; and to comprehend them fully, we must resort to exported cases and writers of acknowledged authority for heir proper exposition and application.

The strictness of the ancient common law rule, which made ne possession of the deed conclusive evidence of its delivey, has been so relaxed by later authorities, "that it may be pplied so as to reach the case of a party whose conduct is urposely fraudulent or will effect an unjust result." 16 Vallace, 4. This is evidently the purpose of our Code. providing that the possession of the deed by the grantee presumptive proof of its delivery, which may be rebutted. When this is taken in connection with the other sections f the Code cited, and construed in parimateria with them, re think there can be little doubt as to the purpose for which this modification of the ancient common law docrine was expressly authorized. Applying the law as thus ualified to the actual facts of this case, we are led to the onclusion that the court below committed no error in ustaining a demurrer to the defence set up by the sureties, nd we shall now proceed to sustain that conclusion by easons and authorities which strike us as satisfactory and ontrolling.

The fact that these sureties were dealing with a public gent. who was acting under specific instructions, conained in the law of the land, with a knowledge of which hey are chargeable, is a circumstance of the weightiest Lewis et al. vs. Board of Commissioners of Roads and Revenues of Go

character in determining their rights and fixing the bility. In the case of Dair vs. The United States, 1 lace, 3, Mr. Justice Davis, who delivered the opin the court, said: "It is important that the quest volved in this case should be settled, on account various interests connected with the administra governmental affairs requiring official bonds to be which, as a general thing, are rarely executed in the ence of both parties. It is easy to see, if the oblig

at liberty, when litigation arises and loss is likely upon them, to set up a condition unknown to the whose duty it was to take the bond, and which is in its result, that the difficulties of procuring satisfier indemnity from those who are required by the law it, will be greatly increased. Especially is this se parties to the action are permitted to testify." In: decision pronounced by the Supreme Court of New as late as the year 1879, (12 Vroom, 403, 406. R.), in a case very like that under consideration Justice Beasley enforces this view by reasoning so that it can hardly fail to rivet conviction upon a prejudiced mind. Among other things, he says of t lic functionary authorized to take the bond: "He authority to do more than this," i. e. to accept a d of the bond; "he is not empowered to make term assent to any conditions in behalf of his principal, ing a public officer, the extent of his ability is know persons dealing with him. The receipt of the bond part of" the agent to take it "is a mere ministerial: in doing it he is the deputy of the ordinary"; (in the of the governor). "It is, too, an official act; and public officer, he cannot in such a transaction be th of an individual." Our Code, §2194 provides that the principal is

by the acts of the agent within the scope of thority, and no further, unless he sees proper to his conduct in whole but not in part.

the agency is "special for a particular purpose,"

And

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aling with the agent should examine his authority. Ib., 196. In this case it was the duty of the governor to ke the bond, to administer to the principal therein the th of office, and thereupon to deliver to him his comission; it was not essential, however, to give his personal tention to such details, but he might, by his dedimus testatem, devolve this duty upon one of the officers of e state authorized to administer oaths. Code, §60. Here e dedimus issued to the ordinary authorized him to lminister the oath of office therewith sent, and upon the ounty treasurer taking and subscribing the same and ving the bond required by law, the proceedings were to e certified to the governor, that they might become a cord. In obedience to this dedimus, the ordinary did ertify to the governor that the county treasurer had come efore him and taken and subscribed the official oath and secuted the official bond sent from the executive departent with said dedimus; that the bond was for the sum I twenty thousand dollars, and the names of the securities. oab Lewis, J. A. Pulliam, Samuel Pulliam and Albert ichols; and that he had delivered to the said county easurer his commission. It will be perceived, from these roceedings, that the only authority the ordinary had was take the oath of the county treasurer, and have the ond sent from the executive departments executed, and make due return of his proceedings in that behalf. onsent to any stipulations or conditions, beyond this rant of power, would have been in excess of the power onferred upon him, and under the law would have een void. He was the deputy of the governor, and ne extent of his powers in this matter growing out f the laws of the state, were known, or at least must e conclusively presumed to be known to these surees. The law entered into and became a part of their ontract as effectually as if its terms had been set forth the instrument.

If it was executed upon any such condition as that set

Lewis et al. vs. Board of Commissioners of Roads and Revenues of Gup in the defence, this fact was never communic

the governor, nor is it even intimated that such case; but if it had been made known to him, we are presume that he would, in open defiance of the leplain violation of his duty, as prescribed, have ratif approved any such arrangement. Whether this things is the result of deliberate design or incautic duct upon the part of these sureties, they should permitted to set up a defence growing out of it. It them to do so, would be to enable them to take ad-

of their own wrong, greatly to the detriment of the interest, and in derogation of the wise and well

policy of the state. In the case of Dair vs. The United States, 1 lace, 1, where a bond payable to the United complete upon its face, as was the case in t stance, was placed in the hands of a co-obligor by lows, upon condition that it was not to be delivered executed by other sureties, but which was in fac mitted to the obligee in violation of the condition, held that they were nevertheless bound, because the enabled the party holding it to deceive and misle obligee by its appearance, when it was not shown had knowledge of the existence of such condition tice of any fact which would put him upon inq charge him with such knowledge. "It must be con says Mr. Justice Davis, "that courts of justice, if power to do so, should not allow a party who, by admission, has induced another, with whom he w tracting, to pursue a line of conduct injurious to h ests, to deny the act or retract the admission, in case Sound policy requires that the prehended loss.

who proceeds on the faith of an act or admission character should be protected, by estopping the pa has brought about this state of things from allegithing in opposition to the natural consequences of

that, whenever an act is done or statement made by

course of action.

It is, accordingly, established of

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hich cannot be contradicted without fraud on his part and injury to others, whose conduct has been influenced by the act or omission, the character of an estoppel will stach to what otherwise would be mere matter of evidence;" citing 2 Smith's Lead. Cas., 7 ed., notes to Duchess f Kensington's case, 424. In support of the conclusion eached in this case, The State vs. Peck, 53 Me., 284; The tate vs. Pepper, 31 Ind., 76; Millett vs. Parker, 3 Metc. Ky.), 608 were cited. The case of The Ordinary of New ersey vs. Thatcher et al., 41 N. J. (12 Vroom) 403, is full pon the question.

According to our Code, §3753, a party will be estopped y admissions upon which others have acted, "either o their own injury" or "the benefit of the party naking such admissions," and "in similar cases, where would be more unjust and productive of more evil o hear the truth than to forbear the investigation." Ve cannot well conceive of a case which more urgently equires a strict enforcement of these wise and conservaive, and at the same time liberal and just, principles than hat presented by this record. The governor was the party equired by law to take this bond; he was the agent of he state acting in this behalf, under powers limited and estricted by law; the ordinary was only his deputy, and was necessarily acting under the same limitations and retrictions as his principal; it was known to these obligors as well as to the ordinary; they allege nothing to the conrary; notwithstanding this, they endeavor to show that hey made this bond only upon a condition to which the ordinary had no power to assent, and to which, in fact, from aught that appears, he did not consent; their names filled up the space in the bond left for them; there were no other seals attached than those opposite to which each signed his name, and no other names appeared in the body of the bond; in this condition it was certified to the executive, without an intimation or suggestion, from any source whatever, that any condition was attached to its execution; the principal received his commission in consequence of Lewis et al rs. Board of Commissioners of Boads and Revenues of Commissioners o

dered them, and when his sureties were called upon afterwards, to make good this default, they set up to that they did not execute and deliver this bond a ports on its face to have been executed and delive they gravely propose to establish these facts by the testimony and that of one other witness. The dobe apprehended from fraud and false swearing, as from the infirmity of human memory, is an amplication of the rule which, under these circumstance quires the rejection of this character of testimony not safe to leave the rights of parties, in such the memory of bystanders; especially when that position to what is written and signed by the par

seems to us that it is wiser and better to regard in suc

actions "not what is said." but rather "what is This rule, in none of its manifold applications, is worth than when it is employed as a safeguard to and communities who are, of necessity, represen public officers. It must strike every one as an a idea, that any of the numerous bonds given to put cers may be defeated, if it can be made to appear l that any of the parties executing them stated to s cers that they were to be inefficacious, unless u happening of some event. The present case a fair illustration of the operation of such a pernicio The parties themselves found this instru the hands of the ordinary for execution, under inst from the executive department, as a security for t lic funds belonging to the county; it was signed l in his presence; his actings and doings in the matt certified to the department, and became a record t

was filed in the proper office, and duly admitted to in the proper court of the county; and now, after the of many years, when it becomes necessary to rest to indemnify the injured party, the endeavor is a explode the entire transaction, by showing, by the Wright rs Zeigler Brothers.

the parties interested and of one other person, that the strument is a nullity, as it was executed on a condition at has not been fulfilled. In our judgment, law and ablic policy are in accord upon the subject, in declaring at such a defence, by the use of such means, cannot be ade available. Ordinary vs. Thatcher, 41 N. J., 410.

We wish it distinctly understood, that all persons dealg with public officers, in matters pertaining to the care and
expenditure of the public treasure, will be required to
expenditure of the public treasure, will be required to
expenditure of the public treasure, will be required to
expenditure of the public treasure, will be required by law
expensive the preservation and protection, and that no conditions
expensive the agreed upon, contrary to, or in excess, or fallexpensive the such legal requirements, will avail those who
expensively in case of his default to perform his enexpensively, in case of his default to perform his enexpensive the protection of the show, by competent evience, to a reasonable certainty, that the agent on whom
the duty is imposed of taking the obligation, has been
uilty of intentional fraud or other wrong, in inducing
them to become bound.

Judgment affirmed.

# WRIGHT vs. ZEIGLER BROTHERS.

Fraudulent misrepresentations which will avoid a sale at the instance of the vendor must have been known to him and have induced him to make a sale which, without them, he would not have made; they must have been made prior to, or at the time of, the contract.

In a suit by a vendor to recover goods, on the ground that the sale was induced by fraud, evidence of fraudulent transactions between the vendee and other parties than the plaintiff, with which the latter had no connection, and of which he had no knowledge, was inadmissible.

7.) In this case the defendant was not the original vendee, but an assignee under him, who represented creditors; and neither he nor they were shown to have knowledge of any fraud which would vitiate the sale.

. The declarations of an assignor, made after the execution of the

## Wright vs. Zeigler Brothers

deed of assignment, were inadmissible for the purpose of ing the assignment or of recovering property embraced in Alliter, if the declarations accompanied the making of the were so nearly connected therewith as to form part of the or if they were made in disparagement of the assignor's the was in possession, or if the assignor and assignee we lusion.

- 4. Suit was originally brought to recover goods from or assignee; by amendment the action was converted against the assignee as an individual, but he insisted, by referce, that he held as assignee for the benefit of the assignitors, including the plaintiff, and was not liable, and that ter must elect to claim under or in opposition to the ass
- Held, that testimony taken while the suit was against the cas assignee, if otherwise unobjectionable, was not rende missible by reason of the amendment.
- 5. If there has been fraud in the contract of sale, the ven either affirm and enforce it, or he may rescind it; he may for the purchase money or sue for the goods. But until if his vendee transfer the goods in whole or in part, wh transfer be of a general or special property in them, to an third person for a valuable consideration, the rights of the
- vendor will be subordinated to those of such innocent thir (a.) A creditor cannot both assail and claim under an ass and he must elect before beginning proceedings. In thaving sued for the goods, that amounts to an election cannot await the result of that suit before electing. The was immaterial, in answering interrogatories, whether answered as to his intention or not.
- The other questions made by this record are determine case of Whittendale vs. Dixon & Bro., decided to-day. April 17, 1888.

Fraud. Vendor and Purchaser. Evidence. ments. Amendment. Before Judge Eve. City (Richmond County. October Term, 1882.

On March 13, 1882, Zeigler Brothers brought tr the city court of Richmond county against Wr assignee of Whittendale, to recover certain good fendant filed the following pleas: (1), That the act of the city court of Richmond county was unconstit and that said court had no jurisdiction in the case the general issue; (3), that defendant holds posse Wright vs Zeigler Brothers.

he property sued for under an assignment made by Whitendale for the benefit of his creditors, among whom plainiffs are classed; and defendant prays that plaintiffs be required to elect whether they will claim as creditors, before proceeding with this action. By agreement, the goods were sold and the proceeds deposited in bank, subect to the determination of the suit.

When the case was called, defendant moved to dismiss to because trover would not lie against the assignee. The court indicated his intention to dismiss the case. Therepon, plaintiffs amended by striking the representative character of Wright, and leaving the suit to proceed against him personally. The case was then continued, claintiffs filing exceptions pendente lite to the rulings of the court.

On the trial, the evidence on behalf of the plaintiffs howed, in brief, the following facts:

Christopher Whittendale, a merchant in Augusta, Georcia, having previously dealt with Zeigler Brothers, on the 7th of December, 1881, gave to one Challenger, their salesnan, then in Augusta, Georgia, an order for the goods sued or, stated to be upon terms as usual, to be shipped by Sarannah at once. The goods were shipped on December 31st, 1881, by the transportation company to whom they nad been delivered December 29th, 1881. On the 27th of December, 1881, Whittendale countermanded the order, tating: "There is no business, and collections are slow." This letter was received December 31st, 1881. ame forward, and were received in the store of Whittenlale January 5th, 1882, their receipt entered on the daybook; and on the 6th of January, 1882, Whittendale exeeuted a general deed of assignment to Wright of all his tock and other property, their goods being in the schedile, and Zeigler Brothers named as creditors. Wright gave notice at once of the deed of assignment. ers obtained from the newspapers their first knowledge of he failure, about January 7th, 1882. On the 10th of Janu-

Wright vs. Zeigler Brothers

goods in possession of the assignee, after having faile effort to stop the goods in transitu. These goods we chased on sixty days' time. At the date of the order date upon which the goods were shipped, Zeigler B believed Whittendale to be perfectly solvent. Whit was in good standing and credit with plaintiffs at t

they sold and shipped the goods.

ary, 1882, one of the plaintiffs visited Augusta, and

The evidence for the plaintiffs, to show fraud, wa lows: A conveyance, November 29th, 1881, by W dale to Hardeman of Whittendale's residence, if thousand dollars, which, on the same day, was co by Hardeman back to Whittendale in trust for h and children. Sales by Whittendale to one J. B. W goods to the amount of \$3,000, about December 20th at from five to eighteen per cent. discount from the the bills for cash, the bills being rendered without s this discount. The books of Whittendale, showing ceased to make entries after December 6th, 1881, received, which then showed a large balance to his c the books being posted in other particulars, exc sales to White and to Damish, a preferred credito January 6th, 1882. That he had on hand August a net capital invested in the business of twelve the eight hundred and forty-seven dollars, and that on of December, 1881, he had nineteen hundred and eight 65-100 dollars to his credit; that he drew b from his business; was in the habit of discounting bills to December 1st, 1881; that he made large pu during December, 1881, a large proportion of which were received after December 20th, 1881; that I \$2,600 and \$2,900 worth were received after Jan 1882, and \$1,447 worth were received on January the day of the assignment; that none of the preferr itors, under the deed of assignment, appear upon hi with the exception of one McKnight's note; that Wright vs. Zeigler Brothers.

th of January, 1882, he executed a deed of assignment, ith preferences to the amount of seventeen thousand even hundred and fifty dollars, with an excess of liabilies over assets of sixteen thousand one hundred and nine-pen 46-100 dollars; that after the deed of assignment, on he 13th of June, 1882, Whittendale, as the trustee of his rife, conveyed his house and lot to Thomas C. Bligh.

In regard to the claim of McKnight, it appears that he and Whittendale had been partners, and dissolved August 5, 881. Whittendale bought the notes and accounts for 2,500, giving therefor three notes due November 1, 1881, anuary 1, 1882, and April 1, 1882, (the last note being or \$500, the others for \$1,000 each). The first note was aid at maturity, the second was marked in the bill-book, Paid January 4, 1882," but no other entry appears.

Damish was another preferred creditor. It appeared hat he was a clerk receiving \$60 per month, and his account as such was balanced by cash and small items of nerchandise. He also had a separate account on the ledger s of "Graham's P. O., S. C.," extending from September to December 12, 1881. The largest purchase at any time was \$186.14. Most of the purchases were for less han \$100, and the aggregate amount was \$858.67. He was credited with payments of cash, and on December 30 he account was balanced. On the blotter appeared enries of purchases on December 28 and 30, 1881, and anuary 3, 1882, which were marked "paid," in pencil. He was placed among the preferred creditors as holding note for \$2,000.

The evidence for the defendant was as follows:

On the 29th of December, 1881, plaintiffs forwarded bill for the goods sued for, which bill contained the following statement printed at the top thereof: "All payments must be made to the firm direct, unless upon special order; ll claims must be made within three days after receipt of coods; no goods taken back unless damaged, or disagreeing with the terms of sale."

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The goods sued for were received at Augusta. the store of Christopher Whittendale, number 839 street. January 5, 1882, and on their receipt ent the day-book of Whittendale. On the 6th of Januar Whittendale executed a deed of assignment to the ant of all his effects, including the stock in trade store, an inventory of which is annexed to the dee signment, and upon which appears the goods s The assignee accepted the trust January 6th, 188 public notice the same day, and filed the deed of ment for record January 7th, 1882, which w recorded. The goods were in the possession of signee at the time the suit was brought, and a made therefor. The names of plaintiffs appear as c on the schedule annexed to the deed of assignment amount of these goods, and also for the sum of ni dred and nineteen 71-100 dollars, goods purchase ber 14th, 1881, for which last debt a suit at law wa tuted in this court March 13th, 1882, and judgme dered July term, 1882. Defendant has no knowl information except what has been acquired by assignee since his appointment. Pursuant to the ment indorsed on the declaration, defendant has cate number 1898 for seven hundred and ninety-100 dollars, issued by the Planters' Loan and Saving with interest at five per cent. This sum is clai Frederick Damish, one of the preferred creditors the deed of assignment, whose debt has not been pa the assets passing thereunder. In due course of mail from Augusta reaches Philadelphia in thirty-six h mailed so as to take the first mail train and not on the route.

The jury found for the plaintiffs, and judgment tered accordingly. Defendant excepted, and assig following errors:

(1.) The court erred in the refusal to exclude the in atories of Zeigler, because the sixth cross-interroge

## Wright re. Zeigler Brothers.

not fully answered. [The interrogatory and answer are set out in the fifth division of the decision.]

- (2). Because the court admitted testimony as to statements made by Whittendale after the assignment and after the plaintiffs had seen the goods in the possession of the assignee.
- (3). Because the court admitted in evidence the deed made from Whittendale to Hardeman on November 29, 1881, and the deed from Hardeman to Whittendale, crustee, of the same date.—Defendant's counsel objected to these deeds as irrelevant, being acts between other parties and not connected with the plaintiffs or the sale of their goods.
- (4). Because the court admitted a deed from Whittenlale, trustee, to Bligh, dated June 13, 1882, and covering the same property as the deeds stated just above.
- (5). Because the court admitted evidence of sales of other goods made by Whittendale to one White after the giving and acceptance of the order for these goods, such sale being for eighteen per cent. below New York cost.—Defendant's counsel objected to this evidence on the ground that only actual fraud mixed with deceit and corruption at the date of the giving of the order would prevent the title from passing by the sale, and because plaintiffs had no knowledge of these facts until after the assignment.
- (6). Because the assignee had no right to question the acts of Whittendale before the assignment, and the plaintiffs could not, by so doing, defeat his title, in an action against him personally, by showing Whittendale's transactions with others to be fraudulent against plaintiffs as creditors, they claiming title only in this action, and not asserting their rights as creditors.

FRANK H. MILLER; FOSTER & LAMAR, for plaintiff in error.

## Wright vs. Zeigler Brothers.

# J. S. & W. T. DAVIDSON, for defendants.

HALL, Justice.

- 1. All the questions made in this case depend u interpretation to be placed on Code, §\$2633, 263provide that fraud, by which the consent of a provide that fraud, by which the consent of a provide that fraud, by which the consent of a provide that fraud, by which the consent of a provide that fraud, by which the consent of a provide that fraud, by which the consent of a provide that fraud, by which the consent of a provide that fraud, by which the consent of a provide that fraud, by which the consent of a provide that fraud, by which the consent of a provide that fraud the consent of a provide the consent of a provide that fraud the consent of a provide the consent of been obtained to a contract of sale, voids the sale fraud consists in a misrepresentation made by t party with a design to deceive, or which does deceive the other; and in the latter case, such m sentation voids the sale, though the party making not aware that his statement was false. It is no pensable that the misstatement should be by words: be by acts as well, or by any artifice designed to n but it is requisite that the misrepresentation sh acted upon, in order to have this effect. The precis tion presented for our determination is whether the representations must have been known to the pa have induced him to make a sale which, without the would not have made; in other words, whether the have been made prior to or at the time of the co The words of the Code, it seems to us, ex vi termin pel an affirmative answer to this question. The sent" of a party must have been "obtained" to t tracts of sale by means of the fraud. Again, the resentations must have been made to the party design to deceive, or he must have been actually by them, and as if to leave no doubt upon the sul is stated that a misrepresentation not acted on is no for annulling a contract.
- 2. If this be so, it follows, that testimony offere action of trover to recover property, in which it was that the plaintiff was induced to sell and deliver fraud of the defendant, of transactions by the def of a fraudulent character, with other parties than the tiffs and with whom the plaintiffs had no connection

this amendment it a new and disv and distinct pareter of the issue : is at least quesa new and disnally proceeded iter the amend-... to the effect mee for Whitand holding in on at law, or ! elect either pursue their int that the sue which it follows inder the

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Wright re Zeigler Brothers.

clarant has parted with his right, are utterly inadm to affect any one claiming under him. The acts a clarations of the assignor, however, have in some in been admitted as binding upon the assignee. Decla made at the time of executing the assignment a admissible as part of the res gestæ, and it has bee that the declarations of the assignor, while he possession of the assigned property, were compete It has also been thought that the admiss the assignor, after the assignment was completed admissible, on the theory that the assignee is the sentative and agent of the assignor. This doctrine ever, is not sustained by principle or authority. T no identity of interest between an insolvent assignment trust for his creditors and his assignee. The latte primarily for the creditors and for those in hostility assignor. He does not represent merely or primar assignor, nor hold chiefly for his interest and bene rather for the creditors of the assignor, and is account in the first place to them. In order to make the d tions of the assignor, after the assignment, compete dence, it must be shown that the assignor and assign combined in a common conspiracy to defraud the ass creditors, and this common purpose must be estal by evidence other than the declarations themselves

This extract is deemed as brief, comprehensive, curate a statement of the law as can be found, and supported by the authorities cited. For a full dis of this question, see the able and exhaustive opin Woodruff, J., in Cuyler vs. McCartney, 40 N. Y. I and also Caldwell vs. Williams, 1 Ind., 405.

4. The suit was originally brought against the def as assignee; it was subsequently converted by an ament into a suit against the defendant as an indi After this was done, a motion was made to reject testaken while the suit was in its original form. T tion was overruled, and the propriety of the decision

## Wright vs. Zeigler Brothers.

depend to some extent upon the fact of this amendment having so changed the suit as to make it a new and distinct cause of action, or one between new and distinct parties (Code §3380), and upon the character of the issue tendered by the defence set up. While it is at least questionable if the amendment did introduce a new and distinct party defendant from the one originally proceeded against (64 Ga., 519), yet the defendant, after the amendment was made, insisted upon his defence, to the effect that he held the property sued for as assignee for Whittendale's creditors, including the plaintiff, and holding in that character, he was not liable to this action at law, or at all events, not unless these plaintiffs should elect either to claim solely under their action or should pursue their rights under the assignment; so that it is apparent that the evidence objected to bore directly upon the issue which the defendant himself tendered; and from this it follows that, so far as it was otherwise unobjectionable under the rulings in this case, it should have been admitted.

5. George J. Zeigler, one of these plaintiffs, was examined by commission; and before an announcement was made the defendant moved to dismiss and remand for re-examination of the witness the entire deposition, upon the ground that the witness had failed to answer the sixth cross-interrogatory; which question and answer is as follows:

Sixth cross: "Is this writ intended by you as renouncing all benefit as a creditor, under the deed of assignment aforesaid; or, in other words, if you fail to recover in this action the goods themselves, do you still claim to be a creditor of Whittendale to the amount of this sale, and that he is liable? Define your understanding of your claim under this action, and state particularly upon what ground you claim the right of ownership of these goods."

Sixth answer: "This is a question of law, and we leave our rights to be asserted by our counsel and determined by the court. We regard the reception of these goods by C. Whittendale as a fraud, and such a fraud as gave him

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or his representatives, wherever they may be, no them; and should we be wrong in this as a matter our counsel will do the next best thing for us in the ter, whatever this may be."

Which motion was overruled by the court. W or not the answer evades the question, or the wif interrogated as to his intention in bringing this su is directly asked whether it is his purpose to rely up suit or to claim under the assignment, or whether response to the question to reply that the purpose the matter inquired about, is a question of law, wh proposes to leave to the determination of his cour our view, is quite immaterial. If there was fraud contract of sale, the vendor might either "affirm a force it," or he might "rescind it." He might " assumpsit for the price, and this would affirm the tract," or he might "sue in trover for the goods of value, and this disaffirms it. But in the meantim until he elects, if his vendor transfer the goods in wh in part, whether the transfer be of the general of special property in them, to an innocent third pers a valuable consideration, the rights of the original will be subordinate to those of such innocent this Benjamin on Sales, 3 American ed., §43 authorities cited. So a creditor cannot be permitte to assail and claim under an assignment; one or the of these alternatives he must take. His election be made before he commences proceedings, and he not be permitted to await the result of his suit in o This would be unfair to others make his election. ing under the assignment. In this case, he has elected annul the sale by bringing the action of trover, a cross question which it is claimed he has failed to a was not pertinent or proper.

As to the portion of the answer which character the conduct of the assignor, that is open to object

Summerville Macadamized, etc., Road Company vs. Baker.

which we need not indicate more particularly, but which will not fail to arrest the attention of the counsel.

6. The other questions made in this record are determined by the judgment of this court just delivered, in the case of Whittendale vs. Dixon & Brothers.

Judgment reversed.

# SUMMERVILLE MACADAMIZED, ETC., ROAD COMPANY vs. BAKER.

- 1. When this case was here before, the judgment of the court below was reversed, and a new trial was ordered, unless the plaintiff should agree to run the line from the southern extremity or edge of defendant's road-bed of fifty feet, and to correct the verdict accordingly. When this judgment was certified to the court below and was placed on the minutes, plaintiff accompanied it with a disclaimer such as was directed by this court; he accepted "the condition named" in the judgment of this court, and disclaimed "all right under the judgment in his favor to encroach on the road-bed of the defendant, and agreed to start the dividing line from the southern edge of the road-bed and run thence south to the other terminus, at the mouth of the gully, it being his intention hereby to accept the line fixed by the jury, less any encroachment on the road-bed of the defendant:"
- Held, that the court below did not err in holding this to be a satisfactory compliance with the condition contained in the judgment of this court, and in overruling the objections of the defendant, and ordering it to go upon the minutes, and that the judgment should be affirmed.
- (a.) It will not be anticipated that the agreement will not be carried out in good faith. When there shall be a violation of its terms and an encroachment upon the rights of the defendant, it will be time enough for the courts to interpose.
- 2. The defendant having brought the case to this court, and the judgment below having been affirmed upon the entering of a disclaimer by the plaintiff, the costs of this court and of the transcript were all which defendant was entitled to recover. It was what he was compelled to pay out to correct the errors complained of, and he is not entitled to more.
- 3. This court has power to render judgments upon terms, or to annex conditions thereto, and the court below has no right to disregard or modify such conditions. The decision of this court and any direction awarded in the case shall be certified by the clerk

Summerville Macadamized, etc., Road Company vs. Baker.

to the court below, under the seal of the Supreme Court, as be respected, and in good faith carried into full effect by the rior court.

April 17, 1883.

Practice in Superior Court. Costs. Practice is preme Court. Before Judge Snead. Richmond St. Court. April Term, 1882.

Baker brought ejectment against the Summ Macadamized, etc., Road Company, and recovered dict for certain described lands. The defendant be the case to the Supreme Court where a reverse granted on terms (February Term, 1882). The stated in the remitter are as follows:

"The judgment of the court below be reversed, on the groutered in charging to the effect that the line of plaintended to the centre of defendant's road-bed; and a new ordered, unless the plaintiff agrees to run the line from the sextremity or edge of defendant's road-bed of fifty feet, and to the verdict accordingly."

When the case was returned to the court below, t fendant objected to the entering of the remitter minutes. The court overruled the objection, and or the remitter to be entered. He also refused to gi defendant a judgment for costs, except for those i The plaintiff entered a disclain Supreme Court. the terms set out in the decision. Defendant's co moved for the passage of an order directing a new or, in default thereof, that the surveyor who had n line in contest be directed to run a new line from the side of the plank road. The court refused this n accepted the disclaimer, and ordered a writ of poss to issue. Defendant excepted and assigned error or of the rulings of the court. One ground of error follows:

"Because, under the constitution and laws of this the Supreme Court does not possess the power of rev Summerville Macadamized, etc., Road Company vs. Baker.

a case upon terms which require the action only of the party whose judgment is reversed, because it appeared to that court that both parties seem agreed as to these terms; and when that court so acted on its own motion alone, it should not have been enforced."

FRANK H. MILLER, for plaintiff in error.

J. S. & E. B. Hook; Foster & LAMAR, for defendant.

HALL, Justice.

This record makes only three questions requiring our notice.

The case was before this court at the February Term, 1882\*, and the judgment of the court below was reversed on the ground that the court erred in charging to the effect that the line of the plaintiff extended to the centre of defendant's road-bed, and a new trial was ordered, unless the plaintiff agreed to run the line from the southern extremity or edge of defendant's road-bed of fifty feet, and to correct the verdict accordingly. When this judgment was certified to the court below, and was placed upon the minutes, the plaintiff at the same time accompanied it with a disclaimer such as was directed by this court. accepted, to use his own words, "the condition named" in the judgment of this court, and disclaimed "all right under the judgment in his favor, to encroach on the roadbed of the defendant, and agreed to start the dividing line from the southern edge of the road-bed, and run thence south to the other terminus, at the mouth of the gully, it being his intention hereby to accept the line fixed by the jury, less any encroachment on the road-bed of the defendant."

The court below held this disclaimer and agreement a satisfactory compliance with the condition contained in the judgment certified from this court, and over the objections of the defendant, ordered it to go upon the minutes

Summerville Macadamized, etc., Road Company vs. Bake

and the judgment to be affirmed. Defendant except this decision, and brings it here for review.

- 1. From a careful examination of this record, we fied that there was no error in this ruling. The acceptance of the condition, without any reserve far as we can see, upon which the judgment was and we are unwilling to anticipate that the agreement be carried out in good faith. When there is tion of its terms, and the rights of the defendant are encroached upon, it will be time enough for the interpose and prevent the wrongs and injuries we defendant seems to apprehend.
- 2. Objection was made to the order and judgme ing cost for bringing the case to this court. The clow awarded to the defendant judgments for the curred in this court and also for fifty-five 50-100 cost of transcript to Supreme Court, paid by dupon obtaining supersedeas, and directed execusion is all the cost for which the defendant of the to have judgment. It was what he had to parameter the errors complained of. Surely he is the to more. 56 Ga., 456; 59 Ib., 199.
- 3. The next objections urged to this proceeding to the power of this court to render judgment upon or to annex conditions thereto, and to the right of the below to disregard or modify such conditions. It one should, at this late day, question the right court to render such judgments, or should claim court below the powers alluded to, we do not hend. "The decision of the court, and any awarded in the case, shall be certified by the cleic court below, under the seal of the Supreme Court below, under the seal of the Supreme Court below, under the seal of the Supreme Court." Code, §4285. Upon a queclear it would be a mere waste of time to make furfixed.

tions, or to offer additional reasons. Some thing

Vason & Davis vs. Gardner, trustee.

ear that all the argument and reason in the world could be to make them clearer, and this we deem one of those sings. This we say, with entire respect for the high perenal and professional standing of the able and learned bunsel who brings these questions before the court for a decision, and who has so earnestly, but courteously, insted upon their correctness.

Judgment affirmed.

# VASON & DAVIS vs. GARDNER, trustee.

The propriety of making Burwell Gardner a party defendant to the ejectment case, for fees in which this suit was brought, is not apparent, under the facts in the record.

It is the duty of counsel for plaintiff in error to present to the presiding judge for his certificate a true bill of exceptions. Where the presiding judge refused to sign a bill of exceptions, on the ground that it "did not contain all the necessary facts and was not truly stated," but failed to state specifically his objections thereto in writing, and after a hearing under order of the judge, and the suggestion of corrections by defendant in error, no further action was taken for four months, during which time the term of this court to which the bill of exceptions would have been returnable had convened, without any effort on the part of the plaintiff in error to compel the signing and certifying of the bill of exceptions, the case would be dismissed on motion-although the judge certifies that he was sick much of the time after the hearing in regard to the corrections until he finally signed the certificate, he also certifying that if he had attempted to rectify the bill of exceptions, he would have been compelled to have rewritten it.

.) No motion to dismiss was made in this case.

A claim against a trust estate may be enforced at law, but the plaintiff must make, by his pleadings and proof, a case in which a court of equity would administer the relief prayed for. He must establish the existence of a trust estate, of what it consists, and the specific facts that render it liable for the debt.

In a suit against one as a trustee of certain named cestuis que trust, a judgment cannot be recovered against him individually.

March 20, 1888.

Practice in Supreme Court. Practice in Superior Court.

#### Vason & Davis vs. Gardner, trustee.

Trusts. Pleading. Judgments. Before Judge Lee Superior Court. March Term, 1882.

Reported in the decision.

HAWKINS & HAWKINS; VASON & ALFRIEND; REED, for plaintiffs in error.

In February, 1858, Granniss, as administrator nedy, brought ejectment against Herron for lo

FRED. H. WEST, for defendant.

HALL, Justice.

144, in 13th district of Lee county, and for mess Herron dying in 1870, at the March term, 187 superior court his death was suggested, and an eather to make James Gardner, of Richmond cours was alleged to be the real defendant, a party in and directing that he be served with a copy of ration and process twenty days before the next the court; and this service was perfected on September, 1871. In October, 1872, service was perfected on Gardner, and also on his wife, and peared and answered to the suit by pleading titles.

A motion was made for a new trial, which wa and thereupon the case was brought to the Ju 1876, of this court, where the judgment of the co was reversed, and a new trial awarded. 57

a large amount of mesne profits.

scription, and the general issue. The case coming a hearing, the plaintiffs had a verdict for the presented in the case coming the case coming a hearing, the plaintiffs had a verdict for the presented in the case coming a hearing.

James Gardner died, and his death being sug record, and it being stated that Burwell Gar "trustee for the property in controversy," he we consent of parties, ordered to be made a party: James Gardner, deceased. Subsequent to the

Pending the motion for a new trial in the cou

## Vason & Davis vs. Gardner, trustee.

ne judgment below by this court, another trial was had a verdict rendered in favor of the defendant in the timent suit.

The propriety of making Burwell Gardner a party endant to this suit is not apparent to us; it does not in that he was in any way the successor of James diner, who, while in life, defended as James Gardner, in individual right, and not as trustee for any one, toner with his wife, who, for aught that appears to the trary, was still in life, and being discovert by the death or ducting this defence, and indeed, as survivor, was the per party to carry on this litigation. She does not aper to have been dropped from it, or to have relinquished right she had to conduct it, and it is not altogether tain that she was ever consulted or gave her consent to arrangement by which Burwell Gardner, as trustee, a made a party to the suit.

. At the termination of this suit, Vason & Davis brought action against Burwell Gardner, "as trustee for Mrs. nes Gardner and her children," for the recovery of one usand dollars, besides interest, which they claim was them for services rendered as attorneys at law, in the ve mentioned ejectment suit. The declaration sets h that Mrs. Gardner and her children were the owners of plantations in the county of Lee, and that one of them uded the lot of land in question. It does not state, howr, either the terms of the trust under which these ntations were held for them, or who were the benefiies of this trust, or the amount and character of interest each or any of them had in the alleged trust property. y state that they were employed to defend by the stee, and that they claim a debt for the amount sued for, n interest, "against the property of the trust estate," pray process against "the defendant, Burwell Gardas trustee." This writ was served on Burwell Gardner, appeared and plead the general issue, non assumpsit,

Vason & Davis ve. Gardner, trustee.

"in manner and form as the plaintiffs in their decomplain against him." The case was tried at the term, 1882, of Lee superior court; and on the 13th da month, after hearing the evidence, the court as non-suit, "for the want of sufficient proof to carry to the jury," as alleged in the order.

On the 17th day of April, 1882, the plaintiffs to the presiding judge a bill of exceptions, in w only error assigned was the "granting of the no said case," and which he then refused to sign and because it "did not contain all the necessary facts, not true as stated." He did, as required by Code return the bill of exceptions to the parties, but state specifically his objections thereto in writ further than as above indicated; however, on tha ordered notice to the opposite party of the fact bill of exceptions tendered was not true, and did tain all the evidence material to a clear understandi case, and of the time of tendering the same, and a the 5th day of May then next ensuing, to hear evider truth of such exceptions, that the same might be This notice was, on the day it was given, dul on counsel for defendant in error, and on the tioned for hearing evidence, the counsel for defe error furnished divers corrections of the statement tained in the bill of exceptions. The corrections then made, because of the sickness of the presiding The whole matter was laid aside, and no further st taken until the 21st day of September, when, bei to retire from office, the presiding judge found pers, and appending thereto the corrections sugg defendant's counsel, he signed and certified the error as thus corrected, and the case was returned February term, 1883, of this court. Ten days were by the above recited section of the Code, after the exceptions was tendered, to make the corrections

that time it was the privilege of the judge to as

Vason & Davis vs Gardner, trustee.

If of the evidence furnished by the opposite party to rrect the errors in the bill of exceptions; but in this se, the time for that purpose was extended to twenty ys; and when the bill of exceptions was certified, some ur months thereafter, the term of this court, to which it ould, in due course of law, have been returned, had comenced and continued for more than fifteen days. as an utter failure upon the part of the plaintiffs in error avail themselves of the remedy provided by law (Code, 558), to compel the signing and certifying of the bill of ceptions in time. True, the judge says that after the h of May, he was sick much of the time, until he finally gned and certified; but he also says that, if he had atmpted to rectify the bill of exceptions, he would have en compelled to have re-written it. But this was no part his duty. It was the duty of the counsel tendering the ll of exceptions to present the facts fully and truly, and have presented nothing but the facts. 7 Ga., 259; 22 b., 212; 45 Ib., 317; 58 Ib., 194; 60 Ib., 447; McBride Co. vs. Beckwith, trustee, 67 Ga., 764, and Hallett, eaver & Burbank vs. Dunn, decided at the present term this court, and not yet published.

If a motion had been made and insisted upon to dismiss its writ of error, we should have been compelled to grant; but it was not done; and, with some hesitancy and bubt as to our jurisdiction over the case, we proceed to spose of it upon the merits, as though it were regularly efore us.

3. Without entering into the various questions made, it ill be sufficient to state that the pleadings did not continuous the requisite statements to charge this property as a sust estate, and the proof, as certified, fell very far short of edjecting this property to the payment of the plaintiffs' edt. Gaudy trustee, vs. Babbitt et al., adm'rs, 56 Ga., 640, fully in point, and holds that "the plaintiff must establish he existence of the trust estate, of what it consists, and the

facts.

#### Vason & Davis vs Gardner, trustee.

specific facts which render it liable for the debt." The

substance of one of the head-notes in this case. Blec in delivering the opinion of the court, is still more "The terms of the trust," he said, "were not show to disclose to the court and jury what were its sc purpose; who, if any, besides Mrs. Gaudy, were t eficiaries; or what, if any, restrictions were impos the trustee's power. Neither did it appear of w trust estate consisted, or what was its value, or wi vielded an income, or whether an encroachment u corpus would be necessary or proper." "While §3377 of the Code, a claim against a trust estate enforced at law, the plaintiff, by his pleadings and must make a case in which a court of equity wo minister the relief prayed for." Winslow vs. O' Ga., 138, furnishes an instance in which a ju founded on a suit which was wanting in these rewas set aside.

In the case at bar, none of these essential facts While it is certain that the plaintiffs rendered in defending the suit in ejectment, the evidence strongly to show that by far the greater part of the vices were rendered, not at the instance of the definithat suit, but of Bartlett, the warrantor of the who is dead and insolvent, and that Vason hims become bound to make good Bartlett's warranty title.

The plaintiffs proposed, on the trial, to amend by from the declaration all the lands mentioned, ex number one hundred and forty-four, in protecting to which the services were rendered; but this ame would have amounted to nothing, because it wo have supplied the defects apparent as to other experiences.

4. Neither was it in the power of the plaintiffs insisted in the argument here, to have judgment Burwell Gardner in his individual character, on tract which it was claimed that he made. According

## Hendrix & McBurney vs. Mason.

allegations in the pleadings, he did not bind himself individually for this debt, but "as trustee." Such a judgment would not have corresponded with the facts stated in the declaration, but would have been directly contrary thereto, and the declaration could not have been so amended as to warrant such a finding. Code, §3480.

Judgment affirmed.

# HENDRIX & McBurney vs. Mason.

[This case was brought forward from the last term, under §4271 (a) of the Code ]

- 1. The statute requires that the applicant for a writ of certiorari should give a bond in order to obtain the writ (leaving out cases in forma pauperis); but where, on an application for certiorari from a justice's court, a proper bond was given to the justice and accepted by him, the fact that the signatures were attested by a mere commercial notary instead of by the magistrate, will not require the dismissal of the certiorari.
- 2. The constitutional provision allowing an appeal to a jury in the justice's court, under such regulations as should be prescribed by law, did not become operative until legislative action prescribing regulations. This was done by the act of 1878. Under that act, a right of appeal to a jury in a justice's court exists in all cases tried therein; in cases involving more than fifty dollars, the right of appeal to the superior court was preserved as it existed before that act.
- (a.) The statements in 65 Ga., 556, apparently conflicting with these views were obiter dicta; to correct this seeming discrepancy, the act of 1882, doubtless, was passed.
- 3. Where an appeal was entered in good faith, but the bond was irregularly executed, it could be amended, no harm being done thereby to the opposite party.

February 20, 1883.

Certiorari. Justice Courts. Bonds. Amendment. Before Judge Hillyer. Fulton Superior Court. April Term, 1882.

Hendrix & McBurney sued Mason in the justice's court of the 1026th district G. M., on an open account for \$75.00.

Hendrix & McBurney vs. Mason.

When the case was called for trial, the defendant present, judgment was rendered for the plainti days later, G. W. Adair, the duly authorized a attorney in fact for Mason, the latter being sick, the office of the justice of the peace and offered an appeal to a jury in that court. He proposed t an amount of money as security, if necessary, tice responded that this was not necessary, but the could sign as security. It was the intention of to do so, and he thought he had done so, until a me made to dismiss. In fact, however, he merely so name once, and the magistrate prepared the balant paper, which was in the following form:

"And now comes the defendant by his attorney at law, G. in the above stated case, within four days from the rendit judgment, and having paid all cost that has accrued up t peals the same to a jury in said court, and tenders as his said appeal. October 28th, 1881.

John Mason, Approved.

B. G. W. Adair.

When the case was called for trial on the appe tion was made to dismiss it because no security given. Adair made affidavit to the facts stated ju and offered to sign as security. This was refuse magistrate, and the appeal was dismissed. D applied for a writ of certiorari. The bond give for that purpose was not attested by the magistrat a commercial notary; but immediately following record appears the certificate of the magistrate payment of costs. When the case was called in rior court, a motion was made to dismiss the because the bond was not properly attested. The was overruled, and the case remanded for trial before in the justice's court, the presiding judge holding appeal bond was amendable. Plaintiffs excep assigned error in the following rulings:

(1.) In refusing to dismiss the certiorari.

(2.) Hendrix & McBurney vs. Mason. ourt.

In holding the appeal bond amendable. In remanding the case for a jury trial in the justice's

SPEAIRS & SIMMONS, for plaintiffs in error.

 $oldsymbol{M}_{oldsymbol{YNATT}}$  &  $oldsymbol{Ho_{WELL}}$ , for defendant.

CKSON, Chief Justice.

he superior court sustained a certiorari to a justice's granted to John Manager a certiorari & McBurrt, granted to John Mason against Hendrix & McBurwhereupon the latter excepted, and assign for error the superior court erred, first, in not dismissing the

of certiorari because the bond was executed before a nercial notary public; secondly, in sustaining the Prari and remanding the case for trial before a jury in

Istice's court; and the case for trial before a juny for jury trial in the interest of holding that the appeal amendable. for jury trial in the justice's court was amendable.

The statute requires that the applicant give a bond, er to obtain a writ of certiorari, but does not prebefore whom it is to be executed. Code, §4054.

te f 1811, from which this section is codified, requires that it shall have to the magistrate, but does not prethat it shall be executed and attested before him.

Dig., p. 523. In this case, it appears to have been of the justice for the jus o the justice, for he certifies to the payment of costs under the the exhibit to the payment of certificate appearing immediately under the

the exhibit to the Petition for the writ. Of certiorari though it would be the certion for the writ. though it was executed before the notary public. the ministerial act of witnessing the execution of by the not act of witnessing the execution of more than

by the notary cannot vitiate it any more than sterial act of taking the affidavit foreclose a
426,434. would vitiate that proceeding. 50 6a., 426, 434.

is legal and secures the debt. The magistrate, sent up shanded to him, or given to him, to be sent up be wishes, e surety to costs being paid, may if he wishes, the Code.

of the Code.

Hendrix & McBurney vs. Mason.

The execution and attestation before the notary prevent this. At all events, a good bond being gi executed before a notary, the court did not err in ing the motion to dismiss the writ.

2. The certiorari was properly sustained and tremanded for trial before a jury in the justice. The constitution of 1877 prescribes that "in all campy be an appeal to a jury in said court, or to rior court, under such regulations as may be presclaw." Code, §5163. In 61 Ga., 74, it was held to regulations were prescribed by the legislature, the could not operate, for want of machinery, and that law of appeal remained. This is the entire scop judgment.

Afterwards a law was enacted in 1878, which that "in any civil case in a justice court, either satisfied with the judgment of the justice may, as enter an appeal to a jury in said court, under rules as now regulate appeals to the superior court that act, the provision in the constitution became by the rules and regulations therein adopted, where the same as those rules which then regulated at the superior court. Code, §4157(a).

True, by the same act an appeal to the supe was allowed too, where the debt was more to dollars; but that cannot be construed to annumer right in the preceding section. Code, §4157 is the effect of the act, as codified, at all altered ence be had to the original act, pamph. p. 18, 1878-9, p. 153-4. The first section is codified in of the Code; the second, is codified in §4157 (b) correctly codified. The ruling in the 65 Ga., 556, or made, is to be found in the head-note. It is sin after trying an appeal, it is too late to certion dictum that "in cases less than fifty dollars" tis "to a jury in the justice court; in cases over lars, to the superior court," is obiter, and not an

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of the law on the facts of that case. If the general embly thought that this court had so ruled, and legislain 1882, acts of 1882, p. 44, to remedy the ruling, it ed under a misapprehension of the facts, for the court is not construing the act of 1878, nor did the judge decring the opinion have it before him, or refer to it.

t. There was no error in allowing the appeal bond to be ended, or in ruling that it might be done. They are always amendable. Code, §3505; 63 Ga., 607, and numerous es there cited from 1st Kelly down. The only exception is, if the appeal be entered in good faith, however egularly, that no harm is done the other party. Here he is done. Adair is bound beyond all doubt. The ot is secured, and the plaintiffs are not hurt. See same e and those cited there.

There can be no doubt that Mason got Adair to enter appeal in good faith, as his attorney in fact; that Adair ant to sign as surety and thought he had done so, but ving it to the magistrate to write everything but his ne, "attorney" instead of "security" was affixed to name with "B." before it, meaning, as the magistrate ended by writing it, "By;" and in the body of it, by same error, the magistrate wrote him as attorney at , instead of attorney in fact. It was clearly a mistake around, as the affidavit of Adair abundantly shows: d the bond should have been amended. Mason was k, providentially hindered from being at court, got his end to enter his appeal, acted in the utmost good faith oughout, and should, in all justice and good conscience, well as in law, have a day in court which sickness prented his having before.

Judgment affirmed.

Hoskins et al vs. Sheddon, administrator, et al.

# Hoskins et al. vs. Sheddon, administrator,

 There was testimony to show that the debts which form ation of this suit were extinguished; but if otherwise, t should not have priority over the debts contracted wi

parties without notice of such stale and questionable de

- 2. Notes were given in Tennessee on October 4, 1869, the left fell due October 4, 1872. On February 7, 1870, the mand administration was granted on March 7, there payees were of full age and under no disability from the maturity of the notes. The administrator died De 1879; and subsequently, the estate of such deceased administrator.
- out of the assets of such estate:

  Held, that the notes were barred by the statute of limitat

being insolvent, the payees of the note sought to colle

- (a.) By the law of Tennessee, the creditors of deceased they reside within that state, shall, within two years, out, in three years from the qualification of the exec ministrator, exhibit to him their accounts, debts and make demand and bring suit for the recovery thereof, o barred in law and equity. No admission or promise on the administrator after the debt is barred, can operate t statute, and not to plead the bar will charge the adminia a devastavit. All actions against the personal repres a decedent, for demands against such decedent, shall within seven years after his death, notwithstanding an
- existing; otherwise they will be forever barred.

  (b.) When a foreign executor or administrator is sued in of this state, the nature and extent of his liability upon the laws of the state where he derived his auth minister the assets of the decedent.

April 10, 1883.

Debtor and Creditor. Administrators and I Comity of States. Laws. Statute of Limitation fore Judge Fain. Whitfield Superior Court. Term, 1882.

Reported in the decision.

- T. R. Jones; R. J. McCamy, for plaintiff in
- W. K. Moore; McCutchen & Shumate; D. Phreys, for defendant.

Hoskins et al. vs. Sheddon, administrator, et al.

wford, Justice.

ne facts material to an understanding of this case, and which the rights of the parties turn, are undisputed, substantially as follows:

n the 4th day of October, 1869, James D. Hoskins, W. Hoskins, George D. Hoskins, Mary I. Sloan and tha J. Hambright, children and heirs of Mrs. John A. kins, being of full age and the joint owners of a farm he state of Tennessee, entered in a contract by which es D. George and Mary I. Sloan sold their interests in said farm to John W. Hoskins and B. F. Hambright, which they received \$300 in cash and separate notes ach amounting to \$1,481, the buyers taking bond for s. On February 7th next thereafter, John W. died, the vendors re-entered on the land, and sold it to es D. Hoskins, another brother, who gave his notes to rge D. and Mary I. Sloan for precisely the same unt of the notes held by them against John W. Hos-. Subsequently, and very soon thereafter, the land again sold to one J. E. Raht, who paid them in full for same.

ohn A. Hoskins, a citizen of Georgia, and father of all e parties, was appointed the administrator of John W. kins, in March, 1870, and continued to be such admintor until his death December 16th, 1879. The litigain this case arises from an effort on the part of James loskins and Mary I. Sloan, to collect out of estate of A. Hoskins, which is insolvent, the notes given by a W. Hoskins to them for their interest in the Tenee farm in October, 1869.

nis claim is based on the fact that, under the laws of nessee, when John W. Hoskins died, being without or children, his real estate went to his brothers and rs, and his personal estate to his father, with the paytof to f his debts as a charge upon it. That the re-entry a the land by the parties selling it was as the heirs of

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their deceased brother, and not as the former owners an abandonment of the contract made with him. their notes against John W. Hoskins had never bee by the said John A. Hoskins, who was his administ and that the estate of said John A., in the hands administrators, the defendants in error, is liable f should be decreed to pay the same.

Under the foregoing facts and the law as applicable to, the chancellor below, to whom the same was subwithout the intervention of a jury, decided that the plainants were not entitled to recover any amount of from the estate of the administrators of the said Johnskins:

- (1st.) Because the effect of taking possession of the under the circumstances set out, extinguished the given for the land.
- (2d.) Because the debts, if not extinguished, were by the statute of limitations.
- 1. Whether the effect of taking possession of the la der the circumstances shown, extinguished the notes to be recovered from the estate of John A. Hoskins is unnecessary to rule in this case. But in looking at facts, we are not prepared to say that the find judgment of the chancellor on this point was For, when it is remembered that the deceased brot only paid one hundred and fifty dollars on the la that, upon his death, another brother came in and executing his notes for the precise amount of the given, notwithstanding the interest of the parties creased; and further, that afterwards it was reso they had received the full value therefor, include course, the value of the share inherited from the b as also, that they had allowed these notes to stand lected through so many years, whilst the father w tracting debts on the faith of the property in his po here, all tend to make such a case as might well sat chancellor that, as the heirs were all grown, and th

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who was the administrator, not objecting thereto, they nade that agreement, and considered the land theirs as beore, thereby extinguishing the notes, at least as far as was necessary to bind themselves. But even if this were not o, should a court of equity allow them, under the agreed tatement of facts, to come in and claim priority over other bona fide creditors of the said John A. Hoskins, and subect his property to the payment of a debt claimed to be a rust debt, originating and existing beyond the jurisdiction of the state, of which even the possibility of notice was doubtful, to say nothing of its being a transaction altogether in the family of the decedent, and of which other creditors could be so easily kept in ignorance? We repeat, therefore, that we are not prepared to say that the debts were not extinguished according to the finding of the chancellor; but even if they were not, that, in equity and good conscience, they should not have priority over the debts contracted with innocent parties without notice of such a stale and questionable demand.

2. Passing from this to the question of the statute of limitations, we have no difficulty in reaching the conclusion that the judgment below was correct on this point. John A. Hoskins was appointed administrator of John W. Hoskins, March 7th, 1870; the notes now claimed were given October 4th, 1869; the last one fell due October 4th, 1872, and there was no disability of the payees, and a full right of action against the administrator from the date of the maturity of the note.

It is provided by the Code of Tennessee (1871), section 2279, that "the creditors of deceased persons, if they reside within this state, shall, within two years, and if without, shall, in three years from the qualification of the executor or administrator, exhibit to them their accounts, debts and claims, and make demand and bring suit for the recovery thereof, or be forever barred in law and equity."

Under this statute, it is held by the supreme court of that state that no admission or promise on the part of the Hoskins et al. vs. Sheddon, administrator, et al.

administrator, after the debt is barred, can operate feat the statute (9 Yerg., 433, 435-63), and that a plead the bar of the statute, will charge the administration with a devastavit. 7 Humph., 373, 383; 3 Head, 658

Section 2786 of the same Code provides, after so the various limitations, as follows: "But all actions as the personal representatives of a decedent for der against such decedent, shall be brought within seven after his death, notwithstanding any disability exist otherwise they will be forever barred."

"This statute," says the supreme court, "estable what is called a positive prescription or limitation, in tradistinction to a negative prescription. The distinction between them is that the former acts upon and extingut the right, while the latter only affects the remedy." vs. Crutcher, 2 Swan., 504, 512; 9 Yerg., 57.

"To this statute there are no exceptions in favor of sons under disabilities. The courts can, therefore, none." 6 Yerg., 224; 1 Head, 248.

Without a repetition of the facts of this case, it is that, if John A. Hoskins were in life and sued as the ministrator of John W. Hoskins by these parties, they not recover, even of the assets of John W., in his hand administered; how much less, then, can they recover the assets of John A., in the hands of his administrate

It will be seen that we have applied the law of nessee to the facts of this case, and this is in confort to the former rulings of this court. In the case of Johnson et al., 56 Ga., 329, this court say: "Va foreign executor or administrator is sued in the conformal of this state, the nature and extent of his liability will pend upon the laws of the state or country where he rived his authority to administer the assets of the deceder.

Judgment affirmed.

## Central Railroad vs. Combs et al.

# CENTRAL RAILROAD vs. COMBS et al.

[This case was argued at the last term, but was ordered re-argued at the present term.

- 1. A railroad company which sells and issues tickets to passengers over its own lines of road and lines of road of other companies (known as through tickets), is liable for the sure and safe transportation of such passengers to the point of destination, notwithstanding there may be indorsed or printed on the tickets so sold and issued a notice that the company issuing and selling such tickets shall not be liable, except as to its own lines of road.
- (a.) The road issuing a check for the baggage of a passenger with a through ticket, has been held liable for its safe and sure carriage and transportation, on the ground that it was a part of its undertaking; and the same principle will apply to the passenger himself.
- 2. Where the agent of a railroad in Atlanta, Georgia, sold to a passenger a ticket to Galveston, Texas, (to which point it was guaranteed he could go,) by way of his own road and connecting roads to New Orleans, and thence by the Morgan line of steamers to Galveston, and upon the arrival of the passenger in New Orleans he found that the steamers on the Morgan line had been taken off; if there were other routes to his destination open to him, the measure of damages which he could recover against the road issuing the ticket, would be what it would have cost him to have reached his destination by other means and routes than the Morgan line, including reasonable pay for delays; and it might include, also, such special damages as the party may have sustained by reason of such delay.
- (a.) If it should appear that no quarantine existed when the ticket was sold, and that subsequently to the purchase, the Morgan line of steamers was withdrawn, in consequence of the prevalence of yellow fever in New Orleans, then the purchaser would not be entitled to recover anything.
- (b.) If the steamers had been withdrawn when the ticket was purchased, and the purchaser proceeded to New Orleans, and there was no other convenient and expeditious way, then the measure of damages would be the expenses of the purchaser from Atlanta to New Orleans and back, expenses while there, necessary expenses on the road, and the loss of time in making the passage there and back.

September 1, 1883.

Railroads. Contracts. Damages. Common Carriers. Before Judge Simmons. Bibb Superior Court. October Term, 1881.

Central Railroad vs. Combs et al.

Reported in the decision.

Lyon & Gresham, for plaintiff in error.

BACON & RUTHERFORD, by brief, for defendants.

BLANDFORD, Justice.

The defendants in error brought their separate actions in the superior court of Bibb county against the plaintiff in error, in which each alleged that he made a contract with the defendant (the plaintiff in error), that for and in consideration of the sum of thirty-five 55-100 dollars. it would transport the plaintiff from the city of Macon, Georgia, to the city of Galveston, Texas; that he paid said amount to defendant, and that defendant issued and delivered to plaintiff a ticket, with certain coupons attached; that plaintiff travelled and was transported on said ticket as far as the city of New Orleans; that part of the ticket so purchased was over the Morgan line from New Orleans to Galveston; that he left the city of Macon on the 20th of August, 1879, and followed the directions given him by defendant, reaching New Orleans on the 21st of August, 1879, and there the defendant failed and refused to carry him farther on his journey, and the Morgan line failed and refused to carry plaintiff from New Orleans to Galveston. And it was further averred that there was no steamer running on the Morgan line from New Orleans, and had not been for a long time before the issuing of said ticket and the making of the contract, and that fact defendant knew before it sold the ticket. These are all the allegations in the declaration material to be considered by this court.

The defendant in the court below and plaintiff in error in this court filed a plea of the general issue.

The plaintiff, Combs, was sworn as a witness in behalf of plaintiffs, and he testified that he wanted to go to Texas for the purpose of buying ponies or horses, in the summer Central Railroad vs. Combs et al.

or winter of 1879, and that he and Richards went to the Central Railroad depot in Macon, and asked the ticket agent as to which was the best way to get to Galveston, and whether they could get tickets to go through on. "He told us he could sell us tickets by way of New Orleans to Galveston, and did sell one to witness and Richards for thirty-five dollars each." Witness identified two tickets shown him, and said that "these are parts of the two tickets sold to us by the agent of the Central Railroad," and were the parts they were not able to use. started to Galveston on the tickets which they bought, and went as far as New Orleans; and when they arrived there and presented the tickets, the agent of the Morgan line of steamers informed them the steamers were not running. "When we found we could not go on to Galveston, we stayed in New Orleans two days and nights, and then returned to Macon. We paid two dollars a day for board each day we stayed in New Orleans, and we paid twentyfour dollars each for tickets back to Macon," sixteen dollars each for expenses on the road there and back; their time was worth each ten dollars per day; that they were gone six days. Upon cross-examination, stated that ticket agent did not say anything to him about not being able to go to New Orleans by Memphis, but heard some conversation between him and Mr. Richards about going by Memphis, but do not know what it was. Did not hear Mr. Hoge, the agent, say he could not sell us tickets by way of Memphis, on account of yellow fever being there, and the tickets had been taken off of sale; nor did I hear him say he did not know whether we could get through New Orleans or not, as he had not been officially notified to take the tickets off sale. Does not remember what month this occurred in, but thinks it was in the winter time. On looking at the date of the ticket, said it was in August, but afterwards said he thought it was in the winter time. His meals on the way to New Orleans cost fifty cents each; remembers no other item of expense go-

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ing to make up the sixteen dollars, except prize can other such things bought on the cars; was a horse of and was certain he could make ten dollars a day.

The plaintiffs introduced in evidence two coup tickets from New Orleans to Galveston, copy of whas follows:

"Central Railroad of Georgia. First Class. Galveston, via C. of G., C. & W., W. of A., L. & N., T. M. L. T. Co. Issued Central Railroad of Georgia. Good for one first-class passage veston, Texas, when officially stamped, and subject to the focontract: 1st. In selling this ticket, this company acts as age

is not responsible beyond its own line," etc.

Stamped on the back of each ticket and coupon:

The defendant introduced S. C. Hoge, who was and he testified that he was the agent of the Centra

"Central Railroad of Georgia. S. C. Hoge, agent. Aug 1879."

road at Macon; sold two tickets in August, 1879, t men, who said they wanted to go to San Antonio, by way of Galveston; did not know whether plaint one of the men, but these are the tickets which he recognizes the stamps and remembers the date on it was in August, 1879. They asked witness if he sell them tickets by Memphis to Galveston; he infethem he could not, as there was yellow fever there place was quarantined, and we had been notified to the tickets off sale. He then asked witness if there we other route they could get tickets, so as to go throw same tickets. Witness replied that he could sell tickets through New Orleans, but he did not know witness.

was there as well as at Memphis. Witness told then he had not been notified to take the tickets off s that route, and, therefore, he had to sell them the tibut he did not tell them they could go through tickets; simply told them he was doubtful about it.

they could get through or not, on account of the y fever being there. Witness knew that the yellow Central Railroad rs. Combs et al

ime after this, the same men who bought the tickets came and demanded a refunding of their money, as they said hey could not get through New Orleans on them; they were referred to Major Shellman.

Major N. T. Shellman was introduced and sworn as a witness for defendant, and he testified that he was the general agent of the Central Railroad at Macon, in 1879; he remembered the plaintiff coming to him to take up the coupons of the two tickets, and to reimburse them for their expenses in going and returning from New Orleans, as they had not been enabled to go further on account of the Morgan line of steamers being quarantined or stopped by the prevalence of yellow fever at New Orleans. Witness refused to pay them, and referred the matter to Mr. Smith, who had charge of the passenger business of the road.

A letter was received from Mr. Smith, and it was read to Combs, who seemed to be acting for himself and Richards. Witness proposed to pay twenty-five 50-100 dollars for the unused portion of the tickets, not because the road was bound, but in order to settle the matter. Combs refused to settle, and the suit was brought.

This is all the testimony submitted by the parties in this case, and as the cases of Combs and Richards were the same in all respects, by consent of the parties, the two cases were tried together, and a verdict was rendered in each case for the sum of one hundred and thirty-nine 55-100 dollars.

The defendant moved for a new trial on several grounds.

(1.) Because the court erred in charging the jury, "If you believe that, at the time the contract was made, these men were notified that they could not get through New Orleans to Galveston, and they agreed to take the risk to see whether they could go through or not, then they are not entitled to recover. It is for you to say whether that was the contract or not. If the agent of the railroad simply expressed a doubt as to their getting through, and they did not agree to take the risk, then the railroad is still liable for the actual damages, whatever they may be.

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- (2.) Because the court erred in charging the jury as follows: "I charge you they are entitled to recover expenses from here to New Orleans and back, expenses while there and necessary expenses on the road, also to recover the loss of time in making passage there and back."
- (3.) Because the jury found contrary to the following charge: "If you believe these men made this contract with the railroad company, or its agents in Macon, for the sale of tickets, and they agreed to transport them from Macon to Galveston, then the railroad is bound to do so, unless from providential cause or something of that sort, and if they did not do it, then the plaintiffs are entitled to recover the actual damage which they have sustained by reason of the railroad company not having complied with its part of the contract."
- (4.) Because the jury found contrary to the evidence and against the weight of evidence.
- (5.) Because the jury found contrary to law and the equity and justice of the case.

The court overruled the motion for a new trial, and error to this court is assigned upon exceptions to this ruling.

1. There are several questions made by this record. First, is a railroad company which sells and issues tickets to passengers and persons over its own lines of road and the lines of road of other companies, known as through tickets, liable for the sure and safe transportation of such passengers or persons to the point of destination, notwith-standing there may be indorsed or printed on the tickets so sold and issued, "that the company issuing and selling such tickets shall not be liable except as to its own line of road"? It has been held by this court that, when a passenger with a through ticket over a connecting line of railroads checks his baggage at the starting point through to his destination, and upon arriving it is damaged and has been broken open and robbed, he may sue the road which issued the check, or he may sue the road

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ing the baggage in bad order. Wolff vs. Central Railad Company, 68 Ga., 653; Hawley vs. Screven et al., c'rs, 62 Ga., 347. In 2 Redfield on Railways, p. 292, 01, it is stated "that taking pay and giving tickets or ecks through for the carriage of baggage of passengers, nds the first company, ordinarily, for the entire route." et this author, who cannot be considered as having any as or prejudice against these corporations, does not assign by reason for the dictum above. He contents himself ith citing the case of McCormick vs. Hudson River Railay, 4 E. D. Smith, 181.

It may be very safely assumed from these decisions at the law of this state is that, when a railroad comany issues and sells a ticket over its own lines of road. d over the lines of other roads to a point desigted, such company is liable to the passenger thus irchasing such ticket, who checks his baggage through the line indicated in the ticket, for the safe and secure rriage and transportation of such baggage. ilroad company would be liable for the safe and secure ansportation of the baggage of a passenger, which is but a envenience and incident of the passenger, it cannot be ery readily perceived, why such company should not be able for the safe and secure carriage and transportation the passenger himself. Why is the company thus conacting, liable for the transportation of the passenger's aggage? Is it not because such is the undertaking of ch company?

In the case of Illinois C. R. vs. Copeland, 24 Ill., 28, the Supreme Court of that state say this: "We old the ticket and the check given by this company, and reduced in evidence, imply a special undertaking to carry the passenger to St. Louis, via the Terre Haute and Alton ailroad, and his baggage also. The ticket is what is known as a through ticket, and the check denotes that the bagge is checked from Chicago to St. Louis, and both interm the passenger that the Illinois Central has running

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connections with the Terre Haute and Alton road, and that they can and will deliver the passenger and baggage, by means of this connection, at St. Louis. The ticket and check are both issued by the Illinois Central: they are the evidence of the contract made with them, and, in effect, speak this language: 'If you will buy this ticket, we will carry you safely to St. Louis, and your baggage also; the terminus of our road, by means of our connection with Terre Haute and Alton road, is at St. Louis, and we guarantee to you your safe arrival there with your baggage, whether we run our own cars through or take those of the other road at the point of intersection. You pay through, and you and your baggage shall be carried through.' This is the contract evidenced we think by the ticket and check." What a close analogy between the case under consideration and the Illinois case above cited! And the reason for the rule is well stated. You pay your money to go through, and the company receiving it guarantees to you that you shall go through safely; it is an implied special contract, and it is not limited by any statements written or printed on the check or ticket not signed by the passenger. In support of this doctrine see Quinby vs. Vanderbilt, 17 N. Y., 306; also Kessler vs. N. Y. C. R. R., 7 Lansing, N. Y., 62. Code of Ga., §2068.

2. There is no error in the several rulings of the court below, except as to the rule given in charge to the jury upon the measure of damages in this case. The court instructed the jury that, if the plaintiffs were entitled to recover, they could recover the passage money from Macon to New Orleans and back, expenses in New Orleans, and expenses on the passage and reasonable compensation for the time employed in the journey. This is not the correct rule of damages in this case. It is not shown by plaintiffs that they made any attempt to reach Galveston, except by the Morgan line of steamers; and it does not appear that there was no other means by which they could have reached Galveston, the point plaintiff in error had guaranteed they should go. The declaration of plaintiffs

oes not so state; but avers the steamers on the Morgan ne had been taken off. It may be there were other outes open at the time; and in such case, the measure of amages would be what it would have cost them to have eached their destination by other means and other routes han the Morgan line of steamers, including reasonable av for delays; and it might be also for such special damge the party may have sustained by reason of such delay. 'his would have been the proper measure of damages nder the facts in this case. If it should appear upon nother trial that no quarantine existed when the tickets vere sold, and that subsequent to the purchase of the tickts by defendants in error, the Morgan line of steamrs were withdrawn, in consequence of the prevalence of ellow fever in New Orleans or elsewhere, then the plainiffs in the court below would not be entitled to recover nything. If, however, it shall be made to appear on he next trial that the steamers had been withdrawn when hey purchased their tickets, and they proceeded to New Orleans on their journey, and there was no other convenent and expeditious way by which they could reach Galreston, then they would be entitled to their expenses, and he rule given by the court below as to the measure of lamages would be applicable.

Judgment reversed.

# STRICKLAND et al. vs. Griffin et al.

[This case was brought forward from the last term, under \$4271(a) of the table

not including that day. Therefore a judgment of the continuous that day was valid, and was not affected by ion of the constitution abolishing county courts.

<sup>(</sup>a.) But a fi. fa. issued on such a judgment by the judge of court, on July 25th, was invalid. The power to be a was transferred by the constitution of 1868 to the man, and (b.) In 49 Ga., 284, the acceptance of an appear and

ministerial duty, in the line of the transmission of unfininess to the superior court.

- 2. A sale under such a void process could pass no title to chaser, nor confer on him any right to have possession to him by the sheriff; nor could the court by its order of power; especially against one claiming and holding at the defendant in execution. The provision requiring the put a purchaser in possession of land sold does not aut to turn out any other person than the defendant in execution.
- heirs, or their tenants, or assignees since the judgment.

  (a.) Even if the fi. fas. were good as between the parties the claiming to be a purchaser bona fide would not be bou judgment, but might attack it for any defect appearing of the record or pleadings, or for fraud or collusion, whe

wherever it interfered with his rights, either at law or in 3. While equity will not ordinarily interfere by injunction

- a bare trespass or apprehended trespass, capable of continuous in case of insolvency, or to prevent in damage, yet where the bill involved also the enforcement and an attack upon a sale, on the ground of fraud which the complainant from asserting her legal rights, there we in granting an injunction until the final hearing.
- 4. The evidence before the chancellor being conflicting, appear that he abused his discretion in granting an injthis case.
  5. Upon an application for injunction, notice should be gi

party sought to be enjoined, and no order for injunction granted until such party can be heard, unless it is mani

judge, from the sworn allegations in the bill or the affidavi petent person, that the injury apprehended will be done, it diate remedy is not afforded. In such case, he may gran an order restraining the party complained of until the latter than the further order of the court, which restraining order the force of an injunction until rescinded or modified. hearing of the application, the chancellor may direct the of injunction issue as prayed for, restraining the defenthe acts named in the order, under a given penalty. For lor in the first instance to grant "a temporary injunct upon the hearing to grant a "permanent injunction," we

Constitutional Law. Courts. Judgments. Exc Equity. Practice in Superior Court. Before Jud show. Clinch County. At Chambers. Decem 1882.

February 27, 1883.

Mrs. Griffin, on behalf of herself and her minor chilen, filed her bill against Strickland and the sheriff of inch county, alleging, in brief, as follows: On February , 1882, one Staten conveyed to the husband of comainant certain land, in trust for complainant and her ildren. It was paid for from her own separate estate. n July 21, or 25, 1868, a judgment was rendered against er husband in the county court of Clinch county, and an xecution was issued thereon from said court on July 25. his was void because the county court had already been polished. It was, however, levied on the land as the roperty of her husband, and this was sold to Strickland. Le agreed to a compromise of the fi. fas., and in conseuence, complainant's husband, then in life, but since ead, did not attend the sale under it or interpose a claim. he f. fa. was charged to have been dormant when the ale was made. The prayer was for injunction to prevent ne sheriff from putting Strickland in possession under an rder of court which had been obtained for that purpose; nat the f. fa. be declared void; and that the sheriff's deed e canceled.

Strickland answered, in brief, as follows: The property as not paid for by claimant, but with property belonging her husband; and the making of the deed to him as sustee was a fraudulent effort to defeat creditors. The recution under which he bought was issued July 25, 1868, at was founded on a verdict and judgment had on July 1. It had been declared valid by the superior court of linch county on a former hearing. A rule had been sued at to require the sheriff to put Strickland in possession, thad been resisted by Griffin, the defendant in execution, at had been granted. A compromise was then agreed pon, but complainant refused to comply with it, and hereupon another order to the sheriff to place Strickland in possession had been obtained.

The testimony introduced before the chancellor need ot be set out here.

On the presentation of the bill, the chancellor passed the following order:

"Read and sanctioned. The defendants are hereby restrained and strictly enjoined from further proceedings to dispossess the complainants under said order, under a penalty of one thousand dollars; and it is further ordered that they and each of them show cause before me on the fourth Monday in October instant, at Blackshear, Pierce county, Georgia, why this injunction should not be made permanent. This October 7, 1881."

On the hearing, the chancellor passed the following order:

"After hearing argument on the within application for injunction, it is considered, ordered and adjudged by the court that the temporary injunction heretofore granted be, and the same is hereby, made permanent."

Defendants excepted.

A. T. McIntyre; Harrison & Peeples, for plaintiffs in error.

No appearance for defendants.

HALL, Justice.

The f. fa. in question was issued by the judge of the county court of Clinch county, and bore date the 25th of July, 1868. Upon its face it purported to issue upon a judgment of the county court rendered on the day it bears date. Some time afterward, this judgment was set aside by a judgment of the superior court of Clinch county, upon a motion regularly served, on the ground that it was rendered by a court which had ceased to exist, under the constitution of 1868. At the time this judgment of the superior court was rendered, access could not be had to the records and proceedings of the county court, as they had been lost or mislaid; subsequently these records were found, and it appearing from them that the judgment was rendered in the county court on the 21st, instead of 25th, of July, the order of the superior court setting it aside

was, upon a regular proceeding, revoked, and it was allowed to stand.

This bill, which is brought by a person who was no party to these proceedings or to the original judgment, makes the point distinctly, that the judgment and fa. fa. were both void, because the judgment was rendered by a court that had ceased to exist, and the fa. fa. was issued by one purporting to be an officer of this defunct tribunal.

1. In Foster vs. Daniels, 39 Ga., 39, 'When a trial was had in the county court of Sumter county and a verdict for the plaintiff on the 20th day of July, 1868, and a judgment was entered thereon on the 22d of July, 1868, and a motion having been made in the superior court to set aside said verdict and judgment, on the ground that on the days they purport to have been rendered and entered the county court was abolished by the constitution of 1868, which motion was allowed by the court, setting aside both the verdict and the judgment,—this court held, that under the reconstruction acts of Congress, the state of Georgia had fully complied with the terms thereof, ratified the fourteenth amendment of the constitution of the United States, and assented to the fundamental condition imposed on her by the act of Congress, passed the 25th day of June, 1868; and, therefore, the constitution of the state of Georgia, amended by Congress, as provided in the 11th paragraph of the 11th article thereof, took effect, and was practically in operation from the 21st day of July, 1868; and also, that all unfinished business in the county court at the abolishment thereof by the constitution, was transferred to the superior court, by the 7th section of the 11th article of the state constitution, and that it was the duty of the superior court to have ordered a judgment to have been entered on the verdict rendered in the county court, on the 20th day of July, 1868, unless some good and sufficient cause was shown, other than the abolishment of the county court on the 21st day of July, 1868.' decision, by its terms, would hold the judgment rendered

as the constitution abolishing the county court to and went into practical operation, not on, but day. But the court further holds, that it ment rendered in that case on the 22d July, she been treated as unfinished business, and renders superior court, as directed by the constitution. The rendering of the judgment was clearly a judgment could have been performed by the court alone the judgment was entered and signed by the attorney or by the judge of the county court.

by the county court of Clinch on the 21st of Ju

But was the issuing of this fi. fa. (admitting the done on the 25th day of July,) anything more tha isterial act? In Colquitt & Baggs vs. Oliver, 49 this court decided that, where a verdict was rethe county court prior to its abolishment, and a was entered afterwards, but within the four days by law, the judgment rendered against the securit appeal on the second trial was valid; that the ac of the appeal bond by the county judge was a m and not a judicial act, and was nothing more transmission of the unfinished business of the cour to the superior court. The analogy between this the one under consideration is not close or comp that case the judge was engaged in the duty im the constitution, which abolished his office, of trans the unfinished business of his court to the superior the act was essential to the performance of the joined upon him by the constitution, and was in ance of its objects. But the retention of such a could not be implied to enable him to issue the en This could and should have been done by the court, after the case was transmitted. The obj not that the judge of the county court was a de fact

and as such could perform a ministerial act; it we he was no officer at all, either de facto or de jure purpose in question; that no such office as that is

ne claimed to act, was in existence at the time the execuion was issued; that *quoad hoc* he was invested with no nore power or authority than a judge whose office had expired, or than one claiming to preside over a tribunal that never had an existence.

And this, we think, is the distinction clearly deducible rom the authorities. The cases cited by counsel for the plaintiff in error certainly recognize it. Hinton vs. Lindpay, 20 Ga., 746; Blount vs. Wells, 55 Ib., 282; Walden vs. County of Lee, 60 Ib., 298. So that we conclude from what appears in the proceedings that the judgment of the county court, which was rendered on the 21st day of July. 1868, was rendered while that court was in existence and was valid; but that the execution, issued four days there after by the judge of the county court, was issued after the court was abolished, by one who had no power to perform such an act, and is void, unless something other than this can be shown to take it out of the rule. If this had been an original question, not fully covered by former de cisions of the court, then we might, perhaps, have corre tained an argument as to how far it was affected by 58 of the Code, which declares that, "Public laws, where themselves prescribe specifically that they are effect 'from and after their passage,' shall not be tory upon the inhabitants until published, and the shall be allowed from the date of publication ... nundred miles distance from the capital, before. edge of the law shall be presumed against the . As this law abolishing the county court wa perative upon the inhabitants of the state only a public tribunal—its officers, it is no -, ts application to the question under con. t conflicts with previous adjudication . . .

It was contended that, as between i. fa., the question as to its validithat there was a judgment in Clumaining and affirming it. A care

record shows this to be a mistake. The motion, or was to set aside the judgment; this motion was a and an order taken setting it aside; at a subseque of the court, this order setting aside the judgmer rescinded. But the validity of the execution wa put in issue in these proceedings, and consequent never passed upon by the court.

2. Inasmuch as this was a void process, land sold

- it could pass no title to the purchaser, or confer up any right to have possession of it delivered to him sheriff; nor could the court by its order confer such especially against one claiming and holding adve the defendant in execution, as the complainant in the alleges she did. The provision requiring the sherif purchasers into possession of the land sold does thorize him to turn out any other person than the ant in execution, his heirs, or their tenants, or as since the judgment. Code, §3651; 23 Ga., 318. Eve fi.fa. had been good, by virtue of any judgment enter a regular issue between the parties thereto, one c to be a purchaser bona fide would not be bound judgment, but might attack it for "any defect ap on the face of the record, or pleadings, or for fraud lusion, whenever or wherever it interfered with hi either at law or in equity." Code, §3596.
- 3. It is contended further, that the injunction not have been granted in this case, because the could not have been prevented thereby from put purchaser into possession, or the purchaser from possession, unless he was insolvent or irreparable would thereupon ensue to the claimant, and the her becoming houseless and homeless would not irreparable mischief and damage. Anthony vs. B. Ga., 576; Bethune vs. Wilkins et al., 8 Ga., 118 van et al. vs. Hearndon, 11 Ga., 294. If this we of bare trespass, or apprehended trespass, capable

pensation in damages, we should follow the above

ies; but there is more in it than this. One of its puroses is to enforce a direct trust; another allegation is hat this sale was effected in consequence of the defendnt's breach of promise, and in violation of a compromise ntered into to avoid the sale, whereby the complainant ras misled and prevented from attending the sale and inisting upon her legal rights; that she was defrauded, and er property was sold at a sum greatly under its actual alue. It is quite true that all these statements were denied by the defendant; that he also set up the fact that he property in question was purchased and paid for vith the means of the defendant in execution, and that he trust deed relied upon was a device to protect it rom this judgment. Complainant, on the other hand, claimed that the land was bought and paid for with her separate property, and the affidavits and other testimony before the chancellor were quite conflicting upon these various questions. Equity will interfere to set aside a judgment, where the court had jurisdiction, and where the party having a good defence was prevented from making it, by the fraudulent act of the adverse party, unmixed with fraud or negligence upon his part. Code, §§3129, 3595. That a court of equity has jurisdiction in cases of trusts, is a principle too familiar to require the citation of authorities in its support. In all cases of fraud, with few exceptions, it has concurrent jurisdiction with courts of law, as also in cases of mistake, accident and surprise.

4. We cannot say that there was such a preponderance of evidence in favor of the defendant in this bill, as to authorize us to hold that the chancellor abused his discretion in this case; and we will not control it, where there is evidence to sustain his ruling in these interlocutory proceedings. We know the difficulty in such cases of getting at the real facts of the case, and think it wiser and safer to withhold our views until they can be brought out on the final hearing, when the attendance of witnesses may be compelled and the full truth elicited, either by oral ex-

amination or testimony taken by commission, neither of which, as the law now stands, is attainable, upon a hearing, where an injunction is applied for.

5. The order directing the injunction in this case is unusual, and may lead to trouble in the future. We have no doubt ourselves that his honor, the chancellor, meant only to grant, in the first instance, a temporary order restraining proceedings until the application for the injunction could be heard and passed upon; and when that was done. that he intended to order the usual injunction to last until the hearing, unless it should be sooner modified or dissolved, upon proper notice. He did not do this, however, but instead thereof, on October 7th, 1881, he ordered a temporary injunction, under a penalty of \$1,000, and directed the parties to show cause before him, on a day named, why the injunction then granted should not be made permanent. On the hearing under this order, he passed the following, to-wit: "After hearing argument on the within application for injunction, it is considered. ordered, etc., that the temporary injunction heretofore granted, be made permanent."

The judge to whom an application for an injunction is made must, before granting an order for the same, cause notice of the application to be given to the party sought to be enjoined, and of the time and place when he will hear the motion, and no order for the injunction shall be granted until such party can be heard, unless it is manifest to the judge, from sworn allegations in the bill, or the affidavit of a competent person, that the injury apprehended will be done if an immediate remedy is not afforded, when he may grant, instanter, an order restraining the party complained of until the hearing or the further order of the court, which restraining order shall have all the force of an injunction, until rescinded or modified by the court. Code, §3211.

Now, it is apparent from the words of this section of the Code, that the judge cannot issue an injunction at all. He

may, when the application is made, if it appear from the sworn allegations in the bill, or the affidavit of a competent person, that the injury apprehended will be done if an immediate remedy is not afforded,—then, i.e., upon that condition and upon that alone, he may grant, instanter, a restraining order (not an injunction), against the party complained of, until the hearing, or the further order of the court, and this restraining order shall have the force of an injunction, until rescinded or modified. Upon the hearing, which must take place under existing rules of law, the injunction may be granted or refused, on the terms required by law. Code, §3212. The law recognizes no such thing as a "temporary" or "permanent" injunction. It does recognize a temporary restraining order, and consequent thereon, an injunction.

When an application is made for an injunction, if it is entertained favorably, the time and place for the hearing should be fixed, and the time and manner of serving the defendant prescribed; then, if a temporary restraining order is proper, the judge should recite that it appeared from the sworn allegations, or from the affidavit of the person making it, that the injury apprehended would be done unless the restraining order issued instanter, and he should grant it, stating wherein the party complained of was to be restrained, and that it should last until the hearing provided for in the order to show cause, or until the further order of the court; and upon the hearing, if he should determine to allow the injunction, he should recite the fact that the hearing was had in conformity with the previous orders in the case, and direct that the writ of injunction issue as prayed, or that it issue restraining the defendant from such acts as are named in the order, under the penalty of —— dollars; and he should then direct such other proceedings as are usual, etc. As the statute was not pursued in this case, and as this issuing of a permanent injunction may be taken for a perpetual injunction, or something between it and the usual writ of injunction, we

have thought it best to reverse this decision for this reason alone, and to direct that the order granting an injunction be modified in accordance with this opinion, and when so modified, that it stand as of the date of the order granting what is inaptly and inappropriately termed a permanent injunction. In all other respects, and upon all other questions made by the bill of exceptions, the judgment of the court below is affirmed.

Judgment reversed.

# SMITH vs. Hornsby et al.

- A defendant in a bill in equity has the right to withdraw his demurrer
  thereto before the court has pronounced and entered his final judgment thereon. An intimation or declaration that he would overrule the demurrer, would not debar the right of withdrawal. This
  right is included in the privilege of amending pleadings at any
  stage of the cause, in matters of form or substance, which is conferred by law.
- Where, in an equity case, both a plea and answer are filed, it is the duty of the court to dispose of the plea before proceeding with the trial on the answer.
- 3. There has been a former suit embracing the same subject-matter as the present bill, and between the same parties. (The complainant and principal defendant were identical. Other defendants in the present case are privies of those in the former.) To the first bill a demurrer was filed, on the ground, among others, that there was no equity therein. The demurrer was sustained, and a judgment taken dismissing the bill, on the ground "that under the allegations of fact therein contained, the complainant was not entitled to the relief prayed for, or any other relief." This decree was brought to the Supreme Court, and there affirmed:
- Held, that the former decree was a bar to the second bill, and a plea to that effect was properly sustained. That facts properly pleaded in the second suit were defectively stated in the former bill, furnishes no ground for relief, it not appearing that the complainant was ignorant of these facts when the case was formerly before the court, or that he was prevented from availing himself of them by accident or mistake, or by the fraud or act of the adverse party. A court of equity will not grant relief from a judgment that could have been prevented but for the negligence of the party seeking it.

April 8, 1888.

Amendment. Practice in Superior Court. Equity. Res Adjudicata. Judgments. Before Judge HARRIS. Campbell Superior Court. August Term, 1882.

Smith filed his bill against Joseph Hornsby, William Stubbs and Arnold Stubbs, alleging, in brief, as follows:

In 1859, William H. Smith, the brother of complainant, purchased from Hornsby 4411 acres of land in Favette county for \$3,000, \$1,500 of which was paid in cash, and a note given for the balance. Wm. H. Smith received a bond for titles. Shortly afterwards, complainant purchased the land from his brother, with the assent of Hornsby, paying to his brother the \$1,500 which the latter had already paid on the purchase money, taking an assignment of the bond, and giving to Hornsby his note, with his brother as security, for the balance, with interest. Complainant then went into possession, and made valuable improvements upon the land. He remained in possession until August, 1867, when he was adjudged a voluntary bankrupt. In 1866, Hornsby sued on the note of complainant and recovered judgment, and in October, 1867, he received \$792.50, which had been raised by levy and sale of some of complainant's property. About the year 1868, Hornsby assigned the judgment to Wm. H. Smith. Shortly after complainant went into bankruptcy, Hornsby wrongfully and fraudulently took possession of the land in dispute, and William and Arnold Stubbs have now been in possession about three years, either as tenants of Hornsby or by some pretended claim under him. Owing to the disability resulting from complainant's bankruptcy, he was unable to bring suit until after September 13, 1877, when, upon his application and by consent of all his creditors who had proved their claims in bankruptcy, he was allowed, by an order of the district court, to withdraw from bankruptcy and dismiss the proceedings. The property is now worth \$4,000, and its value for rent is \$300 per annum, which has been enjoyed by the defendants from

1868, until the present time. The improvements placed upon the land by complainant greatly enhanced both its intrinsic and rental value. Complainant has tendered to Hornsby whatever may be due him, if anything, on the property, and is still ready to pay the same.

The prayer was for an injunction to prevent any sale or transfer of the property; for an accounting as to rents and profits; for specific performance, and that Hornsby be required to make a deed to him; for general relief and subpoena.

By amendment, complainant alleged that on November 27, 1877, he tendered to Hornsby \$1,050, the full amount of the purchase money unpaid, and demanded a deed, which was refused. By a subsequent amendment complainant alleged that a previous bill had been filed by his attorneys, Messrs. Alford & McDaniel, on January 9, 1875. wherein it was alleged by mistake that Weems, his assignee in bankruptcy, had conveyed, by written agreement, to Hornsby all the interest, right and title which complainant had in and to the said land. This allegation was a mistake of fact, and he is advised and believes that what he then supposed was a conveyance of his right, title and interest was in truth and fact not so. No order was ever granted to the assignee to make any such conveyance. He supposed at the time that such an order had been granted, and never learned the contrary until after the former bill had been disposed of. He, therefore, prays to be relieved from any prejudice on account of such allegation.

Defendant demurred to and answered the bill, and pleaded former recovery. The plea alone is material. The former suit, relied on in this plea, was a bill by the same complainant against Hornsby, W. J. Smith, James M. Gorman and his wife Ophelia. This bill alleged the sale by Hornsby to W. H. Smith, the transfer to complainant, the recovery on the note for balance of the purchase money. the adjudication in bankruptcy, the transfer of the f. fa-

the collection of a part of it by Hornsby, similarly to the present bill. That bill alleged also that Hornsby, confederating with his step-daughter, Mrs. Gorman, had made a deed to the property to her, she taking with full notice; that she and her husband were about to make some transfer or conveyance of the land; that on December, 2, 1867, Hornsby confederated with Weems, the assignee in bankruptcy of complainant, and without any consideration, except what may have unlawfully passed between them as a bribe, Weems conveyed all of complainant's interest, right and title to the land to Hornsby; that W. H. Smith had transferred the f. fa. for the balance of the purchase money to W. J. Smith, who took with full notice of complainant's rights, and was taking steps to sell the land.

Complainant tendered the balance of the purchase money which might be due, and prayed an injunction to restrain the sale of the land; that the deed from Hornsby to his step-daughter be cancelled; that the transfer of the bond by Weems, assignee, be set aside; that he have an accounting for rents, etc., and a money judgment against Hornsby. Attached to this bill as an exhibit was an affidavit by complainant, made before the register in bankruptcy, November 27, 1867, and upon this was written a transfer of "the above indenture," "in lieu of a bond held by R. P. Smith." (It appears from the answers in the present case that William Stubbs and Arnold Stubbs hold under Gorman and wife.)

To this bill defendants demurred on various grounds. The court sustained the demurrer, and entered the following judgment: "After argument had upon the demurrer in this case, it is ordered by the court that the demurrer be sustained on the ground that the complainant is not entitled to the relief prayed for, or any other relief, under the allegations of facts in the bill."

This judgment was carried to the Supreme Court and there affirmed (58 Ga., 529); and upon it rests the plea of res adjudicata.

## Smith we Hornsby et al.

D. N. MARTIN; H. M. REID, for plaintiff in error.

GEORGE N. LESTER; T. W. LATHAM, for defendants.

HALL, Justice.

- 1. The defendants in this bill had a right to withdraw their demurrer before the court had pronounced and entered his final decree thereon; an intimation or declaration of the judge that he would overrule the demurrer would not debar the right of withdrawal. Code, §3447 and citations. To deny this right would deprive the party of the privilege of amending his pleadings, which he might do as matter of right at any stage of the cause and in all respects, either in matter of form or of substance. Code, §§3479, 4177.
- 2. It was the duty of the court to dispose of the plea before proceeding with the trial on the answer. Code, §4191.
- 3. There had been a former suit in this case, embracing the same subject-matter as the present bill, and between the same parties. To this suit a demurrer was filed upon the ground, among others, that there was no equity in the bill entitling complainant to the relief prayed, which demurrer was sustained by the court and a final decree thereon taken, dismissing the bill upon the ground "that, under the allegation of facts therein contained, the complainant was not entitled to the relief prayed, or any other relief." This decree was brought by writ of error to this court, and the judgment of the court below was in all respects affirmed 58 Ga., 529.

To the present suit this judgment upon demurrer was pleaded in bar of recovery, and the plea was sustained by the court; to reverse which decision the present writ of error is prosecuted.

Every point raised by the plaintiff in error is fully disposed of by the decision above cited, except the single

point, that the bill now in hand properly pleads facts which were defectively stated in former bills. There is no allegation, however, that the complainant was ignorant of these facts when the case was formerly before the court, or that he was prevented from availing himself of them by accident or mistake, or the fraud or act of the adverse party, unmixed with negligence on his part. Code, \$\$3129. 3595. It is, on the contrary, quite apparent, from the record, that he was well apprised of all the facts now relied on to avoid the force of this decree, before the filing of the bill on which it was rendered, and that he was not prevented by accident, mistake, fraud, or the act of his adversaries, from insisting upon them. The point here raised has been frequently passed upon by this court, and it has been held invariably that there is no relief from a judgment, even in a court of equity, that could have been prevented but for the negligence of the party. 22 Ga., 60; 23 Ib., 366; 32 Ib., 362; 42 Ib., 412. In a recent case involving personal liberty (62 Ga., 598), this court held, that the matter would be deemed res adjudicata as to all points which were necessarily involved in the general question of the legality or illegality of the arrest and detention, whether all of them were accurately presented or not; that it was sufficient if they might and ought to have been presented in the exercise of due diligence. Bleckley, J., delivering the opinion in this case, said (page 604), "The effect of a judgment cannot be avoided by a difference in the pleadings, when those in the first case could and should have been as full as those in the second, though in fact they were not. No party, plaintiff or defendant, is permitted to stand his case before the court on some of its legs, and if it falls, set it up again on the rest, in a subsequent proceeding, and thus evade the bar of a former judgment. It is the body of a case, and not certain of its limbs only, that the final judgment takes hold upon. Whoever bring the legality of an imprisonment into question by writ of habeas corpus, should, in the first in stance, show

as much cause for his attack as he can. He must discharge all his weapons, and not reserve a part of them for use in a future rencounter. He must realize that one defeat will not only terminate the campaign, but end the war." See also 63 Ga., 491, 494, 627.

Judgment affirmed.

# BLEYER et al. vs. Blum & Company.

- A party cannot be prohibited by injunction from going beyond the limits of the state, and carrying with him his own property or the property in which another is legally or equitably interested. In such a case, he may be restrained from doing these things by a writ of ne exeat.
- (a.) In this case there was a rule to show cause why the writ of we exeat should not issue. No order was granted for it to issue, and it never was, in fact, issued or served; but the judge, under a misapprehension, directed, on the hearing, that when the defendant should comply with certain conditions prescribed, "the writ of ne exeat heretofore granted, be revoked and annulled, but that it remain in full force, unless the conditions of this order be fully complied with." These conditions were, that the defendant should turn over to the receiver appointed, all the property embraced in the assignment not sold, and account to him for the proceeds of such as had been sold, or should give bond with security to the sheriff, in the sum of four thousand dollars, for the forthcoming of such proceeds to be disposed of on final order, and should also turn over to such receiver all the property of the assignor than in his possession passing under the assignment:
- Held, that the conditions imposed by the chancellor were variant from, and moreonerous than, those imposed by law. He may, in his discretion, require a larger bond, but he cannot impose other and different conditions.
- (b.) If the defendant fails or refuses to replevy the property, the count may, in his discretion, make such disposition of it as shall appear most advantageous to all parties; but the incongruity of appointing a receiver and ordering the property to be turned over to him, and, at the same time, requiring bond from the defendant for its forthcoming, is apparent; especially before the writ has been ordered, issued or served, and before an opportunity has been afforded to the defendant to relieve himself upon the terms prescribed by law, with a failure on his part so to do.

- (c.) There is no law authorizing, in express terms, an order to show cause why the writ of ne exeat should not issue. This practice applies to injunctions, the appointment of receivers, the granting and refusing of applications for mandamus absolute, and other extraordinary remedies in equity, and must be observed as far as applicable; but the application for a writ of ne exeat is in its nature ex parte, and its very purpose would be defeated if issued upon notice to the defendant.
- 2. So much of the chancellor's order as relates to the writ of ne exeat and the proceedings had thereunder, including the bond given for the forthcoming of the proceeds, etc., must be set aside, and the defendant must be released from custody. The order appointing a receiver is affirmed, and, if not already complied with, can be enforced by attachment for contempt.
- 3. The order should be further modified by striking therefrom all expressions of opinion as to the fraudulent conduct of parties, and the effect upon the assignment of reserving a benefit for the assignor or his wife. These are the main issues made by the bill and answer, and should not be passed upon in this preliminary proceeding, but should be reserved until the final hearing. To avoid apprehended consequences from such expressions, that portion of the order is directed to be stricken.

April 24, 1863.

Practice in Superior Court. Ne exeat. Injunction. Receiver. Extraordinary Remedies. Before Judge RONEY. Richmond County. At Chambers. March 2, 1883.

Max Brown made an assignment to Bleyer for the benefit of creditors, giving preference first to the Bleyer Distilling Company, and afterwards to Blum & Company. The latter filed a bill charging that the deed of assignment was void, because of a reservation of a benefit to Brown thereunder; that the indebtedness of Brown to the Bleyer Distilling Company was much less than it was pretended to be; that it was fraudulently placed at a higher nominal figure, by agreement between Brown and Bleyer; that Bleyer was a non-resident; that he had taken possession under the deed of assignment, and was making sales; that he had paid over \$1,600 by telegraphic money orders, and \$500 by bills of exchange, to the Bleyer Distilling Company; that he was seeking to remove the balance of the

property beyond the limits of the state; that he had forced sales and otherwise acted improperly as assignee: that he was seeking to defraud complainants by converting the goods into money and placing the same beyond the jurisdiction of the courts of this state; that there was not enough property to pay the pretended preferred claim of the Blever Distilling Company and the claim of complainants, and unless the sale of the remnant of the property was restrained, there would not be enough to pay complainants, and unless the removal was restrained, complainants' claim would be defeated. The prayer was for injunction to restrain the removal or further disposition of the property by Bleyer, to restrain the removal or sending any of the proceeds of sales out of the state; that a writ of ne exeat might issue, restraining Bleyer from leaving the state and removing the proceeds therefrom; that Bleyer should be removed as assignee, and a receiver be appointed to take charge of the property; that Blum & Company and the Blever Distilling Company might interplead and determine the amount actually due the latter; that a mortgage held by complainants be foreclosed, and the lien of their claim and its priority be established; also for general Discovery was waived.

The answers denied the leading allegations in the bill. On the hearing, the affidavits in support of the bill and answers, were conflicting. It is unnecessary to set out their contents in detail. Only one fact set up in the answers and affidavits need be stated, viz: that Brown made a bill of sale of certain property to Bleyer, and the latter then made a bill of sale of the same property to Mrs. Brown The amount in cash and goods delivered to Mrs. Brown was \$1,600, and this amount was determined upon on the basis of the exemption to which the debtor's wife would have been entitled, under the laws of Georgia. Defendants insisted that a member of complainants' firm took part in this arrangement. The other facts and rulings of the court are sufficiently detailed in the decision.

ADOLPH BRANDT; F. H. MILLER, for plaintiffs in error.

FOSTER & LAMAR, for defendants.

HALL, Justice.

The prayer of the bill filed in this case was for an injunction, writs of ne exeat, and the appointment of a receiver; it was sanctioned on the 28th day of December, 1882, and the order required the defendants to show cause before the judge of the superior court of the circuit, at such place as he might designate, on the 11th day of January, 1883, or as soon thereafter as the same could be heard, why the prayer of the complainants, and especially so much thereof as asks for the appointment of a receiver and the issuing of the writs of injunction and ne exeat, should not be granted. At the same time a temporary restraining order was passed, inhibiting the defendant, Blever, under a penalty of ten thousand dollars, from changing the status of the property in litigation, etc., and restraining him, under a like penalty, from leaving the jurisdiction of the state, or removing therefrom the said property or any of the proceeds thereof.\*

On the same day this bill was filed in the office of the clerk of the superior court of Richmond county, a subpæna was attached thereto, and copies of the bill, restraining order and subpæna were served on the defendant Bleyer personally. It will be perceived that this sanction did not order the writ of ne exeat to issue, nor was it in fact issued.

After hearing this application, the judge, on the 2d of March, 1883, after reciting such facts as he deemed material and prefacing his decree with these remarks:

"Without going into the details of the charges and proofs submit-

<sup>•</sup> This order was passed by the Hon. Claiborne Snead; the judgment stated further on, to which the bill of exceptions was filed, was rendered by Hon. H. C. Roney, who had succeeded Judge Snead before the hearing.

ted, which give to the defendants' position an extremely unsavory and fraudulent look, I am satisfied that the reservation of the property included in the bills of sale from Brown to Bleyer, and Bleyer to Mrs. Brown, really for Brown, rendered the assignment null and void, and in every possible aspect of the case, the property ought to be put in the hands of a proper party, to hold subject to the claim of whoever may be entitled thereto by the verdict of the jury, upon the final trial of the case,"

# Ordered,

"That Samuel T. Bleyer be, and he is hereby removed from the position of assignee under said alleged assignment. W. Capers, Esq., is hereby appointed receiver, to receive from Samuel T. Bleyer the proceeds of all sales heretofore made by him of property of said Brown, taken possession of by said Blever, under said assignment, and all such property not heretofore sold by said Bleyer, who is hereby required to pay over said proceeds of sales of said property heretofore made, and to turn over all property now on hand to said receiver, to be by him held subject to the further order of this court. It is further ordered, that upon the accounting as aforesaid with said receiver by turning over the proceeds of sales heretofore made, or by giving a good and solvent bond to the sheriff of Richmond county for the forthcoming of said proceeds, to be disposed of by this court, in a bond of four thousand dollars, on final order, and by turning over all property of M. Brown now in his possession, passing under said assignment, that the writ of ne exeat heretofore granted against said Samuel T. Blever be revoked and annulled; but that it remain in full force, unless the conditions of this order are fully complied with."

Immediately upon the passage of this order, what purports to be a writ of *ne exeat*, and reciting this action of the judge as authorizing it, was issued by the clerk and placed in the hands of the sheriff for execution, who returns that he arrested Bleyer, under and by virtue of the foregoing order, and also by virtue of the writ, and Bleyer refusing to give bond, or to deliver the property or proceeds of sale as in said order and writ designated, he took him into custody.

1. This proceeding and the action under it is not only irregular and anomalous, but is in direct opposition to plain and well settled rules of law. A party cannot be prohibited by injunction from going beyond the limits of

the state, and carrying with him his own property, or the property in which another "is legally or equitably" inter-In such a case he may be restrained from doing these things by a writ of ne exeat. Code, §3226, par. 7. A writ of ne exeat must be granted by a judge of the superior court (Ib., §247, par. 2), except in cases of emergency ( Ib., \$3231 ), and it is something separate and distinct from an injunction. It is a writ to arrest the body of the defendant and hold him in custody-2 Daniell's Ch. Pr., 1710-(form of writ, 3 Ib. 2328), and where proper, to seize the property in question and keep it safely, "until he shall relieve himself, or his property, or the specific property, from the restraint thereby imposed, by giving bond in double the value of the plaintiff's claim, with good security, to the officer serving the process, for the forthcoming of each or either (according to the tenor of the writ), to answer to complainant's claim, or to abide by the order and decree of the court." Code, §3228. Here there was a rule on the party to show cause why the writ should not issue as prayed. There never was an order to issue the writ, and none in fact was issued or served, and the judge was laboring under misapprehension when, in his order on the hearing of the rule to show cause, he directed that when the defendant shall comply with certain conditions therein prescribed, "the writ of ne exeat heretofore granted be revoked and annulled; but that it remain in full force, unless the conditions of this order be fully complied with." These conditions were that the defendant should turn over to the receiver appointed all the property embraced in the assignment not sold, and account to him for the proceeds of such as was sold, or should give bond with security to the sheriff in the sum of four thousand dollars, for the forthcoming of such proceeds to be disposed of on final order, and should also turn over to such receiver all the property of the assignor then in his possession passing under said assignment. Now, in case the writ had regularly issued and been served by the arrest of the defendant, it

was his right, as we have seen, to relieve himself and the property from restraint by giving bond and security to the officer serving the process in double the value of complainant's claim, conditioned either for the forthcoming of property to answer said claim, or that he should abide by the order and decree of the court.

The defendant was never served with the process, and never had an opportunity afforded him of relieving himself or the property from restraint, by complying with the terms prescribed by this law. The conditions imposed by this order of the chancellor were widely variant from these, and far more onerous. It is true that, by this section of the Code (3228), the judge granting the writ might, in his discretion, require a larger bond, but it does not thence follow that he is authorized to impose other and different conditions. If the defendant fails or refuses to replevy the property, the court may, in its discretion, make such disposition of it as shall appear most advantageous to all parties. Code, §3229. The incongruity of appointing a receiver and ordering the property to be turned over to him, and at the same time requiring bond from the defendant for its forthcoming, is apparent; especially in doing this before the writ has been ordered and issued, and before it has been served, and an opportunity afforded the defendant to relieve himself upon the terms of the law; and before, under the required conditions, he has failed and refused to replevy the property.

These plain deviations from the provisions of the law do not end here. There is no law authorizing in express terms an order to show cause why the writ of no could should not issue. The chancery proceedings to which this practice applies are injunctions (Code, §3211); and the provisions relating thereto are extended to the appointment of receivers, the granting and refusing applications for mandamus absolute, or other extraordinary remedy in equity, and must be observed to the extent applicable. Code, §3215 (a), 3216. The very purpose of the writ of as a second

would be defeated, if it issued upon notice to the defendant; hence "the application is made by an ex parte motion, and may be made before service of a copy of the bill; the reason of which is, that the giving notice might operate to occasion the mischief which the writ is intended to prevent, by giving the party an opportunity of removing from the jurisdiction." 2 Daniell's Ch. Pr., 1706. This wise precaution is in a very marked manner enjoined by our Code, §3231, which authorizes the writ to issue without the sanction of a judge, upon the affidavit of complainant that it cannot be obtained in time to remedy the mischief.

- 2. For these several reasons, so much of this order as relates to the writ of ne exeat, and all the proceedings had thereunder, including the bond given for the forthcoming of proceeds, etc., must be set aside, and the defendant released from custody. The order appointing a receiver is affirmed, and if there has not already been a compliance therewith, it can be enforced by attachment for contempt-
- 3. The order, we think, should be further modified by striking therefrom all expression of opinion as to the fraudulent conduct of parties, and the effect of reserving a benefit for the assignor, or his wife, upon the assignment. These are the main issues made by the bill and answer, and had better not be passed upon, in this preliminary proceeding, upon an investigation necessarily incomplete and partial; but should be reserved until the final hearing, at which all the means for a full hearing by the court and jury can be commanded, and more justice may be done the parties by a fuller investigation of the case in its various bearings.

It is urged here, that such an expression of opinion may, in the further progress of the case, be insisted upon as an adjudication of the questions to which it applies, or, at all events, that it places the party against whom it is expressed at a disadvantage upon the final hearing. To avoid these consequences, we think the better practice is to re-

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frain from the expression of such views; and that this portion of the order should be stricken, and in conformity with our rulings at the present term in two cases not yet published. (Wardens and Vestry, etc., vs. The Mayor, etc., Savannah; and Strickland vs. Griffin), we so order and direct.

For the foregoing reasons and others which will readily suggest themselves, we do not deem it proper to consider any of the many other questions presented by this voluminous record.

Judgment reversed.

# BELL vs. WESTERN AND ATLANTIC RAILROAD.

- Although the question may be one of negligence, yet if the plaintiff fails to make out a prima facie case, a nonsuit may be awarded.
- 2. Where a railroad employé sued the company for damages resulting from a defective hand-car, and the evidence for the plaintiff showed that he knew of the dangerous condition of the car, but nevertheless made use of it, such fact was fatal to his recovery, and a non-suit was properly awarded.
- It does not alter the case that the employé knowingly undertook to use a dangerously defective tool under the immediate command of a superior employé.\*

April 10, 1883.

Negligence. Railroads. Non-suit. Master and Servant. Before Judge FAIN. Whitfield Superior Court. October Term, 1882.

Bell brought an action for damages against the Western and Atlantic Railroad. On the trial, he testified as follows: Some time in September, 1881, while he was in the employment of defendant at Tunnel Hill, in Whitfield county, he was ordered by one Wade to help run the crank or hand-car, which had the previous evening been brought to

<sup>\*</sup>Compare Central R. R. vs. DeBray (September Term, 1883.)

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Tunnel Hill by some of the railroad hands, to some point up the road, or to Chattanooga, Tenn. This was in the morning about seven o'clock, and before taking his position in or on the hand-car, he noticed that one of the handles of the car was a handle that looked a little longer than the other one, and he called Mr. Wade's attention to the matter before starting up the road, and Mr. Wade told him that, if he would be careful, he did not think there would be any danger, and witness did not think so either: he having ordered witness to tie down the brakes, which the latter did: Mr. Wade telling witness that he would have the handle cut off as soon as they got up to the shops one and a half miles above. There was a blacksmith's shop at Tunnel Hill at which the handle could have been fixed, and after witness had gone about one mile and a half, and near the shop, he was ordered to put on the brakes, which he did, and the handle of the car being too long, and having worked out a little in going the mile and a half. in trying to stop the car the handle struck the dashboard of the car, and it caught in the clothes of witness, and threw him in front of the car and upon the track, injuring and "scaring"(?) him up badly. Witness had never had his hands upon the car before, and had not used the car in any way. Mr. Wade told him he thought there would be no danger, if he would be careful. He, witness, was hurt on the head and neck and arms, and was badly bruised up. He was not at fault and not injured through any negligence of his. If the car had been sound, he would not have been injured. The handle of the car was immediately afterward on the same day cut off, by the order of The handle by which witness was injured was a temporary one, put in there by the railroad men, and it was several inches longer than the other handle. If the handle had been of proper length, it would not have touched the dash-board.

Other evidence as to the extent of the injury was introduced, which is not material here.

## Bell vs. Western and Atlantic Railroad.

On motion, the court granted a non-suit, and plaintiff excepted.

- B. Z. HERNDON, by W. K. Moore, for plaintiff in error.
- R. J. McCamy, for defendant.

JACKSON, Chief Justice.

- 1. The question made is, was the non-suit properly awarded? And that depends on this other question, did the plaintiff make out a prima facie case entitling him to recover? If he did not, a non-suit was legally awarded, although the question was one of negligence. Gassaway vs. The Georgia Southern Railroad, 69 Ga., 347.
- 2. Did he make out a prima facie case for recovery! If in the case made by his own testimony he showed himself in fault, he did not make out a prima facie case. He showed himself in fault, if he knew of the dangerous character of the tool he used. Baker vs. Western and Atlantic Railroad Company, 68 Ga., 699. In the case at bar, he knew that the hand-car was defective. He called the attention of the section master to it himself. and both concurred in its not being entirely safe, but as requiring care in its use. The defect known to both was that one of the handles of the car was longer than the That plaintiff apprehended danger from it, is apparent from his calling attention to it, and that it was to be repaired at the company's shops, a short distance off. As ruled in Baker vs. this same company, supra, knowledge of "the dangerous condition of the tool or instrument," coupled with the fact that the employé afterwards uses itfatal to his recovery. That case controls this, on this point.

3. Nor does it vary the case that "the employé knowingly undertakes to use a dangerously defective tool under the immediate command of a superior employé," Bakt vs. W. & A. Railroad, supra. So that the direction of

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command of the section-master does not relieve the plaintiff's case from this insurmountable fault in himself. See Wood's Master and Servant, sec. 366, 377; 55 Ga., 133, 279; 58 Ib., 485; 50 Ib., 465; 56 Ib., 586; 60 Ib., 119; 63 Ib., 173.

Judgment affirmed.

# Morton, Bliss & Company vs. Gahona et al.

- In a claim case, if the execution be insufficient, the proper motion
  on the part of the claimant is to dismiss the levy or to exclude the
  fi. fa. from evidence. His only concern is that the execution shall
  not proceed against his property; and a motion to quash the same
  does not lie in his mouth.
- 2. Where a mortgage on certain lumber, rosin and cotton shipped on board a vessel known as the "Juanita Clar" was foreclosed, and the f. fa. directed the sheriff "that of lumber, rosin and bales of cotton now on board the 'Juanita Clar,' lying in said county, you cause" etc., the description in such f. fa. was insufficient.
- An execution issued on the foreclosure of a mortgage on realty should show upon whose property it is directed to be levied.
   April 24, 1883.

Practice in Superior Court. Executions. Claims. Mortgage. Before Judge Tompkins. Chatham Superior Court. June Term, 1882.

Reported in the decision.

J. J. ABRAMS; S. YATES LEVY, for plaintiffs in error.

CHARLTON & MACKALL, for defendants.

. Jackson, Chief Justice.

On April 28th, 1882, plaintiffs in error foreclosed in the court below as a mortgage on personalty the following instrument in writing:

# Morton, Bliss & Company vs Gahous et a'.

"SAVANNAH, April 25th, 1882.

"Received from Octavus Cohen & Company, agents for Morton-Bliss & Company, eight thousand five hundred dollars on account of sterling exchange on Mildred Gageweek & Company, arising from shipment and measures taken preparatory to the shipment of lumber. rosin, and bales of cotton, per "Juanita Clar." for Mahan, Spain. which cotton is covered by policies of insurance against fire and marine risks, and which policies and cotton are hereby bound and pledged specially to Morton, Bliss & Company, for the fulfillment of the contract to furnish exchange agreed to, and for the money here advanced in case of non-completion of the contract for any cause.

[Signed]

GABRIEL J. GARONA.

Signed in presence of

OCTAVUS COHEN.

"GEORGIA-Chatham County.

"Personally comes Octavus Cohen, who on oath says, that he saw Gabriel J. Gahona sign the within named lien.

[Signed]

OCTAVUS COREN.

"Sworn to and subscribed before me, Savannah, April 28th, 1882. [Signed] SIGMUND ELSINGER,

N. P. and E. O. J. P."

The mortgage aforesaid was certified as being recorded April 28th, 1882. The affidavit for foreclosure was in the usual form and correct. Upon the affidavit being filed with the mortgage annexed, the clerk issued an execution of which the following is a copy:

"STATE OF GEORGIA—Chatham County. Fi. fa.

To all and singular the sheriffs and coroners of this state, author ized by law, greeting:

You are hereby commanded, that of lumber, rosin, and bales of cotton, now on board the "Juanita Clar," lying in said county, you cause to be levied, and will sell sufficient thereof to satisfy the principal sum of eight thousand five hundred dollars, with interest from April 25, 1882, which J. J. Abrams, as attorney for Morton, Bliss & Company, on the 28th day of April, in the year eighteen hundred and eighty-two, swore to be due to said Morton, Bliss & Company, on a mortgage made by said G. J. Gahona to said Morton, Bliss & Company, the affidavit for foreclosure being of file in clerk's office, and also the sum of three dollars, seventy-five cents, which to the said plaintiff was adjudged for costs and charges, in this behalf expended, whereof

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the said G. J. Gahona and said lumber, rosin, and bales of cotton, convicted as appears of record; and have that money before the said court, on the first Monday in June next, to render to the said plaintiff for debt and costs aforesaid; and have then and there this writ.

Witness-The Honorable H. B. Tompkins,

Judge of the Said Court.

This 28th day of April, in the year of our Lord one thousand eight hundred and eighty-three.

J. J. ABRAMS, Plaintiff's Attorney."

JAMES K. P. CARE, Deputy Clerk. [Seal.]

Upon said f. fa. is the following entry:

"SAVANNAH, May 6th, 1882

"I have this day levied the within fi. fa. on one hundred and six bales of cotton on board the "Juanita Clar" as the property (cotton) described in the within fi. fa., and have placed a watchman in charge of the same.

The return of

JOHN T. RONAN, Sheriff C. C."

On May 6, 1882, a claim to the property levied on was filed in regular form by Juan Clar, and upon the filing of the same, the sheriff delivered the property levied on to the claimant.

On July 11, 1882, at the June term of court, the claim case came on to be heard, and the claimant moved to dismiss the levy upon the following grounds:

- (1.) Because the description of the property mentioned in said execution is vague, uncertain, and insufficient.
- (2.) Because the execution does not show upon whose property the same is to be levied.

Upon the filing of said motion, the court below dismissed the levy, and plaintiffs in error filed their bill of exceptions.

- 1. We think that the court below was right to dismiss the levy. It did not lie in the mouth of the claimant to move to quash the execution. It only concerned him that the execution should not touch his property. 62 Ga, 286.
  - 2. The description of the property in the execution is

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wholly insufficient. It is, "you are commanded that of lumber, rosin, and bales cotton, now on board the 'Juanita Clar,' lying in said county, you cause," etc., without even using the definite article "the." What lumber, what rosin, what cotton? What portion of each? Of it, you must make the money, but of which of it? It does not specify at all. 61 Ga., 390.

3. The execution should also show upon whose property it was directed to be levied. See same case; also Freeman on Executions, §42.

Judgment affirmed.

# HADDOCK et al. vs. PERHAM, ordinary, for use, et al.

 The laws of this state give a right of action against trustees and their bondsmen for breaches of their bonds, and courts of law have jurisdiction of such actions.

2. A testator bequeathed certain realty and personalty to a trustee to be held for his daughter's benefit, and "at her death to go to her children, and if she should die without children," then the property was to go to testator's heirs at law. The first trustee resigned, and a second was appointed and gave bond to the ordinary. This bond recited his appointment, stated the property received by him, and was conditioned for the faithful performance of "all and singular the duties required as trustee, agreeably to his appointment, and the law, and also well and faithfully to account of and concerning the said trust:"

Held, that this bond was not solely for the protection of the cestwing use vie and her heirs, but was for the protection of the heirs of the testator as well, upon the death of the daughter without children. The duties of the trustee were not fully performed until he turned the property over to the beneficiaries in accordance with the terms of the trust; until then, his accountability for the property and its increase continued.

3. The recovering of a decree against the trustee is no bar to the right of the plaintiffs to resort to the bond given by the trustee and his sureties, to recover the money found to be due by the decree; and such decree is prima facie evidence against the sureties of the amount found to be due by the trustee.

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- 4. Where, in an equity cause between the remaindermen and the trustee, certain property was awarded to the latter, and it was not sought to hold him responsible therefor, the delivery of such property to him did not work a discharge to the sureties, and a plea to that effect was properly stricken.
- 5. The will above stated did not create an estate tail, but an estate for the use of testator's daughter for life, then to her children in fee; but if she left no children, then it was to revert and pass in fee to such persons as might at that time be the heirs of testator.
- 6. After a demurrer had been properly overruled, pleas which set up no facts, but only repeated in effect the legal propositions embodied in the demurrer, were properly stricken.
- The evidence not only authorized but required the verdict. March 20, 1883.

Trusts. Actions. Wills. Estates. Judgment. Principal and Surety. Practice in Superior Court. New Trial. Before Judge Hansell. Brooks Superior Court. November Term, 1882.

Reported in the decision.

- W. C. McCall; D. W. Rountree, for plaintiffs in error.
  - W. B. Bennett; Kingsberry & Denmark, for defendants.

HALL, Justice.

James Hilliard, by item eight of his will (which after his death was duly proved and admitted to record), bequeathed to Henry G. Turner, in trust for testator's daughter, Arabella B., certain houses and other real estate situate in the town of Quitman, together with household and kitchen furniture, personal trinkets and attire, and a certain sum of money, to be held for her benefit, and "at her death to go to her children, and if she should die without chilton," then the property was to go to testator's "heirs at law." The will was executed and proved in 1872.

A rabella B. Hilliard married L. F. Haddock, and soon after her marriage, Turner resigned the trusteeship of the property.

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vested in him by this will, and Haddock was appointed by the judge of the superior court of the southern circuit, accepted the appointment, and gave bond to the ordinary of Brooks county and his successors in office, with A. J. Rountree and W. H. Stanley as his sureties, in the sum of two thousand dollars, conditioned for the faithful performance of "all and singular the duties required as trustee agreeably to his appointment and the law; and also well and faithfully to account of and concerning the said trust." The condition of the bond recited his appointment, and specified, item by item, the property that went from the former trustee's into his hands.

Arabella B. Haddock died, leaving no child or children. and a portion of the heirs of James Hilliard who survived, and certain persons to whom a portion of the heirs had assigned their interest in this property, held in trust for her during her life, brought suit on the equity side of Brooks superior court against L. F. Haddock for the recovery of the property thus held by him in trust. Upon the trial of this equity case, the complainants had a verdict, and on that verdict and in accordance therewith, a decree was rendered and signed on the 9th day of November. 1881, by which they recovered all the real estate mentioned in the 8th item of James Hilliard's will and two hundred dollars, as rent accrued since the death of Arabella B. Haddock. The real property recovered by this decree was turned over to the complainants by L. F. Haddock, the trustee, and failing to pay the money thereby found against him, execution issued for the amount, on which the sheriff returned nulla bona; and thereupon the ordinary, for the use of the plaintiffs in said execution, instituted a suit against said L. F. Haddock, then of Houston, and A. J. Rountree and William H. Stanley, of Brooks county, in the superior court of said last mentioned county, upon their bond, executed on Haddock's appointment as trustee, for the recovery of the unpaid portion of the said decree. The defendants to this last suit appeared at the

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return term thereof and filed a demurrer in writing thereto, upon the grounds following:

- (1.) The superior court of Brooks county has no jurisdiction in the case.
- (2.) The superior court of Houston county has jurisdiction.
- (3.) Courts of common law have no jurisdiction in such cases.
- (4.) Courts of equity have jurisdiction over trustees and their bondsmen.
- (5.) The laws of Georgia give no right of action against trustees and their bondsmen.
- (6.) Because such bonds are given only for the benefit of the cestui que trust and her heirs.
  - (7.) Plaintiffs have no right of action upon the bond.
- (8.) Bondsmen are not liable for rents, issues and profits after the death of life tenant.
- (9.) Because, as shown by plaintiff's declaration, said cause has been fully adjudicated.
- (10.) Plaintiffs are not the heirs or successors of Arabella B. Haddock, and do not allege themselves to be such, but are the heirs of James Hilliard, as they allege.

This demurrer was overruled by the court, and the defendants filed a bill of exceptions pendente lite to the judgment overruling the same; thereupon they pleaded the general issue and a special defence on behalf of the sureties, that they were released, because, after their liability had accrued, plaintiffs turned over to Haddock divers articles of personal property embraced in the 8th item of James Hilliard's will, and valued at seven hundred dollars. This last plea was, on motion, stricken by the court. They then went to trial upon the general issue, and certain special pleas containing the substance of the matters set forth in the demurrer which had been overruled, and a further plea was also filed, that by the terms of the 8th item of James Hilliard's will, an estate tail was created in Arabella to the property thereby bequeathed; and this was likewise

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stricken by the court. The jury returned a verdict for the plaintiff for two hundred dollars, and interest on that sum from the date of the decree.

Judgment was entered up on this verdict, and a motion was made for a new trial upon the usual grounds, that the verdict was contrary to law and evidence, and that the court committed error in relation to the several rulings above specified. This motion was overruled and a new trial refused; whereupon the defendants brought the case here by bill of exceptions.

In the argument here, several of the errors assigned were abandoned, as those relating to the jurisdiction of the superior courts of Brooks and Houston counties.

- 1. That courts of law have jurisdiction of this case, see  $59 \, Ga.$ , 755, which covers the point precisely, and shows beyond question that the laws of this state do give a right of action against trustees and their bondsmen.
- 2. It is a mistake to suppose that the bond in this case was given solely for the protection of the cestui que vie and her heirs, and that the plaintiffs who were the ultimate remaindermen, after she had died without issue living at her death, had no right to any action thereon for the protection of their interests, or that they were debarred from recovering the rents, issues and profits received by Haddock after his wife's death, he having possessed himself of the property as her trustee. 48 Ga., 537; 41 Ib., 426. "The duties of the trustee are not fully performed until he turns the property of the trust over to the beneficiaries, dividing it among them as required by the deed of trust." 44 Ga., 644. Until this is done, the trust, so far as the accountability of the trustee for the property and its increase is concerned, is not at an end. It would be strange, if there were no power in the courts to compel a recusant trustee to perform this essential duty, or to enforce the undertaking of those who had become responsible for his discharge of the obligation. 58 Ga., 284, 285.
  - 3. We cannot agree to the proposition that the decree,

#### Haddock et al. vs. Perham, ordinary, for use, et al.

fixing the liability of the trustee, is a bar to the right of the plaintiffs in this suit to resort to the bond given by the trustee and his sureties, to recover the money found to be due to them by the decree. It may be true that the decree is not conclusive against the securities, as to the amount found to be due from the trustee, but it is prima facie evidence of the fact. 57 Ga., 507.

- 4. The plea of the sureties setting up their discharge because the trustee was allowed to retain certain personal property, was properly stricken, because the decree in the equity cause, as set out in the declaration, awarded that property to him, and the suit did not seek to hold him responsible therefor, and because it is difficult, if not impossible, to understand how the facts set forth in that plea could injure them, increase their risk, or expose them to greater liability, even if they had been, as they certainly were not, the acts of the plaintiffs. Code, §2154.
  - 5. There is nothing in the objection that the 8th item of Hilliard's will created an estate tail in the property bequeathed to Mrs. Haddock for life, and at her death to her children, and if she died without children, then over to testator's legal heirs. The estate created was one in Mrs. Haddock for life, and then to her children in fee. but if she left no children, then it was to revert and pass in tee to such persons as might at that time be the heirs of testator, i. e., perhaps in this instance his residuary legatees. 58 Ga., 259; 30 Ib., 638.
  - 6. There was no error in striking the other pleas; they set up no facts, and were only a repetition of legal propositions embodied in a demurrer, which, as we have seen, was properly overruled.
  - 7. The plaintiffs made out their case, when they had shown the trustee's indebtedness to them and his failure to pay, as was done by the decree rendered in the equity cause, the execution issued thereon, and the sheriff's return of nulla bona. The defendants offered no testimony in

opposition, and the evidence was such as not only to authorize but to require the verdict returned.

Judgment affirmed.

## MERRITT vs. BAGWELL.

- Where a declaration in complaint on a promissory note set out the names of the makers, the payee, the amount, date and time of payment, a failure to attach a copy to the declaration could be cured by amendment.
- (a.) If one of two defendants to a suit on a note against them as makers, tacitly permits judgment by default to be rendered against his co-defendant, when the note is afterwards offered in evidence against him, he cannot object to it on the ground that judgment had previously been rendered against his co-defendant. He had consented, by his silence, to a severance.
- 2. F. presented a note to M. for signature, stating that it was for less than sixty dollars, (the amount of a note which he had formerly signed, and which F. then destroyed). It was, in fact, for more. M. being old and infirm and reading with difficulty, relied upon the representation of F., and signed the note. It was then passed, before due, to B., in part payment for two wagons sold by him to F. One of them was taken away, and the other was left at the gin house of B. After this trade was consummated, but before the second wagon had been removed from the gin house, M. notified B. of the fraud which had been practiced upon him. F. had sold the second wagon to another party, who carried it away without resistance from B.:

Held, that these facts did not prevent a recovery on the note by B.

- (a.) A bona fide holder of a promissory note for value who receive the same before due and without notice of any fraud, may recover against the maker thereof, although the person from whom he received it may have obtained the signature of the maker by fraud.
- (b.) Generally the delivery of goods is essential to the perfection of a sale, but this need not be actual, may be dispensed with by the intention of the parties, and may be inferred from a variety a facts. After such a sale had been consummated, and a note not yet due, received bona fide in part payment for the goods, one who signed the note could not, by notice, compel the vendor to resched the trade.
- (c.) Nor could the maker of the note compel the vendor of the goods to hold possession of property which he had sold, and to litigate with the purchaser, or one claiming under him, for the benefit of such maker.

- 3. A motion in arrest of judgment can be sustained only for defects appearing on the face of the pleadings which could not be cured by amendment and are not aided by verdict. The pleadings must be so defective that no legal judgment can be rendered thereon.
- (a.) Non-joinder or misjoinder is a matter for dilatory plea or plea in abatement, and must be taken advantage of at the first term, by such plea or by demurrer, if then apparent. Former recovery or pendency of another suit for the same cause of action between the same parties, is matter for plea in abatement, and must be taken advantage of at the first term, or if occurring afterwards in the progress of the trial, so soon as may be after it occurs.
  March 13, 1883.

Amendment. Debtor and Creditor. Practice in Superior Court. Sales. Title. Judgment. Vendor and Purchaser. Before Judge Wellborn. Hall Superior Court. August Term, 1882.

Reported in the decision.

W. L. MARLER; H. H. PERRY, for plaintiff in error.

J. B. Estes, for defendant.

# HALL, Justice.

John D. Bagwell instituted suit upon a promissory note, payable to J. D. Bagwell & Co. or bearer, for one hundred and fifteen dollars, bearing date 25th February, 1876, due the first day of November then next, with ten per cent. interest from date, and signed by W. C. Williams, W. W. Findley and E. W. Merritt.

The suit was in the statutory form against all three of the makers; Merritt and Findley alone were served, the declaration stating that Williams' "place of residence was unknown" to the plaintiff. No copy of the note was uppended. There was no return of non est inventus as lay Williams, and no order taken to proceed against the other defendants. Findley filed no defence, and at the term, judgment was awarded against him and regard the presiding judge without the intervention of a price.

Merritt pleaded the general issue, and that the note was procured from him by the fraud of his co-defendant, Findley. for whom and Williams he was only security, etc. At the hearing, he withdrew this latter plea, stood by and saw the judgment given by the court against Findley, without objection upon his part, and did not, at the first term, file any plea for want of proper parties, or because of a non-joinder of parties defendant. On the trial, when the note was offered in evidence, he objected to its introduction because no copy had been attached to the declaration, and for the further reason that judgment had already been entered against his co-defendant, Findley. On motion, the court allowed the declaration to be amended by attaching a copy of the note, Merritt objecting thereto, upon the ground that there was nothing to amend by. Upon the amendment being made, the note was read in evidence; and on this, error is assigned, as also upon both the grounds taken for its rejection.

1. There was no error in allowing this amendment. The substance of the note was set forth in the declaration; the names of the makers, payee, amount, date and time of payment were specifically stated. There was, therefore, enough in the pleadings to amend by. Code, §3479. Ross vs. Jordan, 62 Ga., 298, covers the precise point made here. See, also, Camp vs. Smith, 61 Ga., 449, which recognizes the same principle, by allowing an abstract of title to be added as an amendment to a complaint for the recovery of real estate.

The other ground taken against the admission of the note in evidence, was equally unavailing. If good at all, it was good in abatement of the suit, and should have been made, if it appeared on the face of the pleadings, by demurrer to the suit, either at the first term of the court or as soon thereafter as it existed, and if not taken by demurrer, then it should have been insisted upon by plea in abatement. Merritt's conduct at the hearing, was certainly a waiver of the objection. It is claimed now that

this judgment was a former recovery against all the defendants; but by the Code, §3476, "a former recovery is good cause of abatement, in a suit between the same parties." Here one of the defendants consented, by his silence, to a severance between himself and the others. so far as this judgment was concerned. The defendant. against whom the court awarded judgment, filed no issuable defence under oath, to a suit founded upon an unconditional contract in writing, and it is questionable, to say the least, if a judgment rendered in any other manner, would have been valid and binding against him. \$\$3448, 5145; 38 Rule of Court, Ib., p. 1350. The objection is not aided by the decision of this court in 35 Ga., 72, 73, cited for plaintiff in error. The suit in that case was upon a foreign judgment, rendered against numerous tortfeasors, and the court held that the judgment made them joint, and not joint and several, defendants, which they were before it was rendered; and that the striking of one of them released the others, notwithstanding the Code, **§34**85.

2. After this was done, Merritt amended his plea by adding thereto the following: That he had only signed the note as security: that his signature had been obtained by the fraud of Findley, the principal; and that he notified Bagwell, the payee, of the fraud, before he had parted with the consideration for which the note was passed to him. The alleged fraud, as set out in the plea, consisted in Findley's misrepresentation to Merritt as to the amount of the note, stating to him that it was less than sixty dollars (the amount of a note which defendant had formerly signed, and which Findley then destroyed); that defendant was old and infirm and read with difficulty, and relied solely upon the representations made by Findley. seems that the note, when signed, was passed to Bagwell in part payment for two wagons which Bagwell had sold to Findley. One of the wagons was taken away by Findley, and the other left at Bagwell's gin house. After this

trade was consummated, and before Findley had removed the other wagon from the gin house, Bagwell was notified by Merritt of the fraud that had been practiced in the procurement of the note, and he was requested not to deliver the other wagon. Findley, it seems, had sold this wagon to one Pollard, who came and took it away. Bagwell did not claim the right to control this wagon, and upon consulting counsel, was advised that he had no right to retain it, and did not attempt to do so.

The court charged the jury, under the facts in proof. that although the wagon was left in the possession of Bagwell, the title to it had passed out of him, and after the title had so passed out of him, he had no right to retain it. although he may have then received notice of Findley's fraud on Merritt; and refused to charge, at request of Merritt's counsel, that "if Bagwell had notice of the fraud before he delivered the wagon, he could only recover from Merritt such part of the note as went to the consideration of the wagon already delivered"; or that, "if Bagwell had notice of the fraud before he delivered the wagon. it was Bagwell's right, if he was not satisfied with the note without Merritt's signature, to rescind the trade and hold the wagon until a satisfactory note was given"; and lastly, that "if Pollard purchased from Findley and Williams while the wagon was in Bagwell's possession, he purchased subject to Bagwell's rights."

Under the charge and the evidence, the jury found a verdict for the plaintiff for the full amount of the note.

It is not pretended that Bagwell had any agency in procuring Merritt's signature to this note, or that he was in any manner privy to the fraud by which it was procured; indeed, the very reverse of this is fairly inferable, not only from the pleadings, but the proof in the case, and Bagwell swears positively that he knew nothing of it until he received notice of it from Merritt, after the trade had been consummated between himself and Williams and Findley. This court has placed a construction upon Code.

\$2785, which relieves the holder of a note from liability, if he had no agency in its fraudulent procurement. Ga., 66; 48 Ib., 162. The sale of the wagons and the receipt of the consideration agreed to be paid by the seller. certainly vested the title in the purchaser. The intention of parties may dispense with delivery, which is generally necessary to the perfection of a sale of goods; this delivery need not be actual, but may be inferred from a variety of After delivery, actual or constructive, the goods are at the risk of the purchaser. Code, \$2644. The soller in this case, could not be made to rescind a sale which had been consummated, at the request of a party to a note which had been passed to him and which he received bona fide before due, although the party from whom he received it had no title thereto. Code, \$2639, and in connection, Ib., \$3640. Nor are we more strongly impressed with Mr. Merritt's right to compel Bagwell to hold on ". property which he had sold, and to carry on a litigation with the purchasers or their vendee for Merritt's benefit The property in this case remained at Bugwell's 1000 February until August. Merritt knew it was there as knew the extent of Bagwell's control over it. all that time, he took no step to secure this wager payment of the note on which he was bound. quested Bagwell "to keep the wagon for him to late money on"; to which Bagwell replied "that". though still at his gin, belonged to Findles e. 1 yet he would keep it as long as he could. to make his money." Did keep it until Pollard came for it; notified Merritt of the as to consult counsel, who told him. ..... give it up; had no claim to the wage ... the money and note. After this, Police he could make no further objection

he purchased subject to Bagwell's rights." Bagwell had no rights in the property; the sale had divested all he ever had; besides, this and the other requests refused, if not in direct contradiction to the charge given, were neither pertinent nor relevant to any issue between the parties in this litigation, and could have had no effect but to divert the attention of the jury from what was properly before them.

The evidence in this case leaves it doubtful when Pollard became the purchaser of this wagon. If he purchased before Merritt gave notice of the fraud in the procurement of the note, then his title was protected; or, if he purchased before he had any notice at all of any infirmity in Findley and Williams' title to the property, then, as between him and Bagwell, his title might or might not, according to circumstances, have been valid, and Bagwell, without more, may have been obliged to deliver the wagon to him. In this view of the case, the record in Mrs. Pollard's suit vs. Prior et al., when taken in connection with the other testimony bearing upon the subject of that suit, may, by 2 possibility, have been admissible. But whether admissible or not, it could only bear upon an issue raised by Merritt himself, which, as we have seen, was not properly in the case between him and Bagwell. It did no hurt and could have had no possible influence upon the finding in the It was immaterial, and affords no reason for a new trial, even if its admission was error.

What has gone before, together with the usual grounds. constitute the entire motion for a new trial. The verdict was not only authorized, but imperatively demanded by the evidence in the case, and the new trial was, therefore, properly refused.

- 3. Merritt moved to arrest the judgment:
- (1.) Because the record showed that W. C. Williams one of the joint defendants, was not served, and there was no return by the sheriff of non est inventus, as to him.
  - (2.) Because the record showed that, before the verdict

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and judgment against Merritt, a judgment had been obtained on the same cause of action, against W. W. Findley, one of the defendants in the case.

This motion can be sustained only for such defects appearing on the face of the pleadings as are not amendable. Code, §3587. The pleadings must be so defective that no legal judgment can be rendered. *Ib.*, §3589. But a judgment cannot be arrested for any defect in the pleadings or record that is aided by verdict, or is amendable as matter of form. *Ib.*, §3590.

These grounds of the motion in arrest have already been, to some extent, anticipated, the last more largely than the first.

The non-joinder or misjoinder of defendants is matter for a dilatory plea or plea in abatement, and must be taken advantage of at the first term of the court. (Code, §3456; 27 Ga., 113); or if then apparent, by demurrer. Former recovery or pendency of another suit for the same cause of action and between the same parties, is matter in abatement, and must be taken advantage of at the first term, or if occurring afterwards, in the progress of trial, so soon as may be, after it occurs. Code, §3476; 51 Ga., 232; 59 Ga., 175, 176; 57 Ib., 63; 39 Ib., 556; 45 Ib., 158; 53 Ib., 451; 55 Ib., 229; 35 Ib., 66 et seq.

Judgment affirmed.

# NASHVILLE AND CHATTANOOGA RAILROAD vs. McMahon.

1. The act of 1860, which provided for the perfecting of service upon the Nashville and Chattanooga railroad in this state by posting the process, warrant, summons, or notice to be served upon a post, to be erected by the justices of the inferior court at Lookout, in Dade county, and also mailing a copy to the president, was not affected by the adoption of the constitution of 1861 or that of 1868, in each of which it was declared that laws shall have a general operation, and no general law affecting private rights shall be varied in any particular case by special legislation, except by the free consent in writing of the persons to be affected thereby, etc.

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- (a.) Nor did such constitutional provisions render illegal the act of 1869, which merely changed the place at which the post provided for by act of 1860 was to be erected.
- (b.) The acts of 1845 and 1855, which are claimed to be the general laws on the subject of the service of corporations having no place of business in Georgia or no individual upon whom service may be perfected, contained no provision for service except in the superior court, the inferior court, or such other courts as have a clerk, while this case originated in a justice's court.
- 2. Such service may be the foundation of a personal judgment against the defendant.

April 10, 1888.

Railroads. Service. Venue. Before Judge FAIN. Dade Superior Court. March Term, 1882.

Reported in the decision.

KEY & RICHMOND; W. T. NEWMAN, for plaintiffs in error.

W. N. & J. P. JACOWAY; R. J. McCAMY, for defendant

CRAWFORD, Justice.

The only question made in this case is as to the legality of the service upon the defendant in the court below. That service was perfected in the manner pointed out by law.

In the year 1860, an act was passed to enable parties having claims against the Nashville and Chattanooga Railroad Company, in the state of Georgia, to perfect service upon it. It recited in the preamble, that there being no station or agent in the state upon whom to perfect service on said company for injuries to stock, property or person, it was, therefore, enacted that the justices of the inferior court in and for the county of Dade should cause to be erected a post, at a place in said county known as Lookout; and upon any process, warrant, summons or notice, from any of the courts of this state, being issued against said company, and the same being posted on said post, and a

## Nashville and Chattanooga Railroad as McMahon.

copy thereof sent by mail to the address of the president, on or before the day it was placed on the said post by the officer serving the same, should be deemed and held as full and complete service in law, and as binding on the company as if made on any officer, agent or employé.

To the foregoing act an amendment was passed in 1869, in which, after reciting the fact that the said railroad company had discontinued the depot or way-station at Lookout, it was, therefore, enacted that the ordinary of the county of Dade should cause to be erected a post at the place on the said railroad known as Hooker, and upon which such legal notices as provided for in the act, of 1860 should be thereafter posted, and copies sent by mail, as required by the said act, to the president of the company, and this was to be deemed and held as full and complete service.

1. It was not denied by the defendant that the service had been perfected as required by these acts, but that they were unconstitutional.

In support of this view, we are cited to a clause in the constitution of 1868, copied substantially from the constitution of 1861, which declares that laws shall have a general operation, and no general law affecting private rights shall be varied in any particular case by special legislation, except by the free consent in writing of the person to be affected thereby, etc.

We think it sufficient to say, in reference to this objection, that the act of 1860 was not to be affected by the foregoing clause of the constitutions of 1861 or 1868, if indeed it could be construed to refer to the particular subject-matter of that act at all. Nor could it be said to be operative upon the amendment of 1869, which only changed the place at which the post, provided for by the act of 1860, was to be erected. Besides, it could in no sense be applicable to the case at bar, because the acts of 1845 and 1855, which are said to be the general laws upon the subject of the service of corporations having no place of doing business, or no individual upon whom service

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may be perfected, have no provision for service except in the superior and inferior courts, or such other courts as have a clerk, whilst this case originated in the justices' courts.

We hold, therefore, that the service was good, and no error was committed by the court below in his judgment on that point.

2. It is, however, further insisted that the judgment in this case was a personal judgment against the plaintiff in error, and that such judgments can only be rendered where there was either valid legal service upon the party, appearance, or attachment of property and publication. Georgia, by her laws, declares that service may be perfected on individuals, either personally by giving them copies of the writ or paper to be served, or by leaving the same at their most notorious places of abode; and with either, judgments in personam are rendered. We are at a loss to see why, this corporation having a location in the county of Dade, and a way station, if not a depot. at which their trains stop, receive, and discharge passengers, it is not competent for the legislature to provide, that service may be perfected upon it, by posting notices of such papers as may be necessary to bring it into court, and especially when it is further required that copies thereof shall be sent by mail to the president of the company. The forwarding of copies to the president is a requirement not necessary to a personal judgment against individuals in Georgia.

Judgment affirmed.

# LANGFORD vs. DRIVER.

- Where a married woman makes application for a homestead, the records should show out of whose land it is to be carved, so that creditors may be notified that their interests are attacked. If this be not done, the record of the homestead cannot be admitted in evidence.
- The grounds upon which counsel ask the court to exclude testimony from the jury should always be precisely stated, so that the judge

#### Langford vs. Driver.

- below and this court may be able to understand and rule correctly thereon. A mere general assignment of error in admitting certain testimony cannot be considered by this court.
- 3. In order to require a reversal on the ground that the judge refused to suppress certain interrogatories because the witness had a memorandum which he failed to attach to his answers, it should appear that the motion was made in writing, and notice thereof given before the trial.
- 4. An acknowledgment of service by the defendant on a declaration, before the same is filed in office, will authorize a judgment against him, although it may not be shown that he appeared and defended the suit, or knew that it was proceeding against him previous to the judgment.
- The defendant was bound by his acknowledgment of service on the declaration, and was entitled to no further notice before judgment.
- The verdict was not contrary to law, evidence or justice. April 3, 1883.

Homestead. Husband and Wife. Interrogatories. Practice in Superior Court. Practice in Supreme Court. Service. Waiver. Before Judge HARRIS. Troup Superior Court. April Term, 1882.

Driver sued Langford for the purchase money of building materials furnished to the latter. The declaration was filed April 5, 1875. Prior to that date, on March 17, 1875, Langford acknowledged due and legal service upon it, and waived copy, process, and service by the sheriff. Judgment was rendered by default, and a levy made on real estate. Langford interposed a claim as head of a family, alleging that the property had been set apart as a homestead. On the trial, the jury found the property subject. Claimant moved for a new trial, on the following among other grounds:

(1.) Because the court held the proceedings to obtain the homestead void, and rejected the same from evidence. [The application was made by the wife of the debtor. It set out the names and ages of the members of the family, stated that the husband declined to apply for a homestead, and that thereupon she made application on behalf of her-

## Langford vs. Driver

self and family. Attached to the application was a schedule "of the real and personal estate owned and possessed by her said husband and herself, in which she prays and applies for a homestead and exemption."]

- (2.) Because the court admitted certain stated evidence of the plaintiff, over objection of claimant's counsel. [The ground of objection is not stated.]
- (3.) Because the court refused to suppress the interrogatories of plaintiff, on motion of claimant's counsel, on the ground that plaintiff swore from a memorandum which was not attached to the answer. [When this motion was made, does not appear.]
- (4.) Because the court refused to charge to the effect that an acknowledgment of service on the declaration before it was filed was not sufficient, and that a judgment obtained on such a proceeding would be void, unless the defendant appeared and defended the suit, or knew that it was actually proceeding against him before the judgment; but charged to the contrary.
- (5.) Because the verdict was contrary to law and evidence.

The motion was overruled, and claimant excepted.

B. H. BIGHAM, for plaintiff in error.

FERRELL & LONGLEY, for defendant.

CRAWFORD, Justice.

The error complained of in this case is the overruling a motion for a new trial.

1. The first ground of that motion is because the judge rejected the papers and proceedings offered in evidence to show that a homestead had been set apart in the land claimed. The ground upon which the judge held the paper nadmissible, appears to be that the application therefor was made by Mrs. Isabella M. Langford, the wife of the

## Langford rs. Driver.

defendant in f. fa., and did not set forth therein out of whose land the same was to be taken.

According to the ruling of this court in the case of Wilder & Son vs. Frederick, 67 Ga., 669, not yet reported, the judge below properly rejected this evidence. In that case it was held that, where a married woman made application for homestead, the record should show out of whose land it was to be carved, so that the creditors might be notified that their interests were attacked. And further, that, whilst in all cases it was best to specify out of whose lands the same was to be taken, yet where it was to be carved out of some other person's than that of the applicant, unless it was so stated, that it would be invalid.

The application in this case being by the wife for exemption of personalty and homestead, should have specified definitely out of whose lands the homestead was to be carved, and out of whose personalty the exemption was to be allowed. Instead, however, of this, her petition states, that the schedule which she sets forth is "a correct schedule of the personal and real estate owned and possessed by her said husband and herself." From this, it will be seen the utter impossibility of ascertaining whether she owned only a few articles of the personalty, or a portion of the realty, or all of the realty and none of the personalty. It was clearly no compliance with the requirements of the law, and was therefore invalid.

2. The second ground of error assigned in the motion for a new trial is in allowing certain evidence of the plaintiff in f. fa. to be admitted, over the objection of claimant's counsel. It not appearing upon what ground the objection was made, it is impossible for this court to determine whether the same was or was not properly rejected. The grounds upon which counsel ask the court to exclude testimony from the jury should always be precisely stated, so that the judge below and this court would be able to understand and rule correctly thereon.

## Howell 18, Field.

3. The third is that the judge refused to suppress the interrogatories of the plaintiff in fi. fa., on the ground that in his answer to the 8th cross-interrogatory it appeared that he had a memorandum book, and failed to attach it to his answers.

It is not shown at what time this motion was made, and as the objection went to the execution, it should have been made in writing, and notice given before the trial; it was certainly too late to suppress upon that ground after the same had commenced. Errors must be shown to be corrected. 44 Ga., 278.

- 4. The fourth ground of the motion is, in substance, that the judge refused to charge the jury that the acknowledgment of service by a defendant on a declaration, before the same is filed in office, will not authorize a judgment against him, unless it is shown by evidence that he appeared and defended the suit, or knew that it was proceeding against him previous to the judgment. We do not think that there is any legal merit in this ground.
- 5. The fifth refers to the evidence touching the fourth, and falls with it, as the defendant was bound by his acknowledgment of service on the declaration, and was entitled to no further notice before judgment.
- 6. The sixth and last ground is that the jury found against the law, and against the evidence, and contrary to justice.

We do not think that this ground is well taken. Judgment affirmed:

# Howell vs. Field.

- Where a debtor, his creditor and a third person, who owed the
  debtor, came together, and it was agreed that the third person
  should pay the creditor, who thereupon looked to him for payment, and the debtor was released, the third person became the
  debtor by substitution, and the contract was not within the statute
  of frauds.
- 2. Suits in justices' courts are not to be held to such technical rules

#### Howell re. Field.

as those in courts of record. The law requires no pleading in writing for the trial of a case; and, therefore, subsequent amendments are not indispensable to a judgment.

April 3, 1883.

Statute of Frauds. Justice Courts. Contracts. Debtor and Creditor. Before Judge FAIN. Murray Superior Court. August Term, 1882.

Reported in the decision.

LUFFMAN & HARRIS; B. J. McCamy, for plaintiff in error.

TRAMMELL STARR, for defendant.

CRAWFORD, Justice.

The plaintiff in this case sued the defendant in a justice's court, on a debt which, in the original summons, was stated thus:

"1880. E. S. Howell to S. E. Field, Dr. \$16.60. On promise to pay the debt of G. C. and L. C. Terry."

There have been three jury trials in the justice's court of this case, and three times has it been carried by certimari to the superior court. The verdict was in favor of the plaintiff on each trial. They were set aside twice, upon the ground that the promise, if made, was void, under the statute of frauds. Upon the last trial, the testimony, in the opinion of the court, made a different case, and the certiorari was not sustained. The defendant, therefore, assigns error on that ruling, and brings the same to this court.

1. An examination of the testimony offered on each trial, as set out in the record, may make the two first verdicts somewhat doubtful, but as to the third and last, it is clearly and fully supported by the proofs submitted. Besides the evidence adduced on the first two trials, the plaintiff testified that he had a debt due him by the Terrys,

#### Howell vs. Field.

amounting to \$16.60; that he and the defendant met at Mr. Terry's house; that plaintiff and defendant and the Terrys were all present, when he told them that he wanted his money, to which Howell, the defendant, replied that he would pay it, though he did not have the money then, but would go to Aloculsa in a few days, get the money and pay it; that he, the plaintiff, then told the Terrys he would look to Howell for his pay; and it was then agreed between them all that he should do so, and release the Terrys from their debt to him; that, relying and depending upon this agreement, he released them and accepted Howell as his debtor. This testimony was supported by the Terrys, and the jury believed it. Under this agreement, Howell was substituted for the Terrys, and became the debtor of Field, the consideration moving Howell being the purchase of certain land from the Terrys, and against which Field claimed to have a lien for bricks and The facts, as found by the jury, lime used thereon. bring this case within the rulings of the cases of Sapp vs. Faircloth, decided at the present term, not yet reported: Edenfield vs. Canady, 60 Ga., 456; Anderson & Tucker vs. Whitehead & Co., 55 Ib., 277.

It was contended, on the argument, that there were other facts in proof which destroyed the force and effect of the above testimony. Doubtless, without explanation, this might have been so; but it all was before the jury, considered and weighed by them; and the facts must stand as they were found to exist; the duty of the court was to apply the law to them as found, and render judgment accordingly. This was done.

2. It was further insisted that, without an amendment of the original cause of action, no such judgment should have been allowed.

Upon this point, it is sufficient to say that the suit was for a debt claimed by the plaintiff to be due him from the defendant, and in undertaking to state how it originated, he failed to make out such a statement of the defendant.

### Rawlings rs. Robson.

liability as the facts warranted. These suits in justices' courts are not to be held to such technical rules as prevail in courts of record. Indeed, the law requires no pleadings in writing to try a case in these courts, and in fact should not. No original pleadings were necessary, and no subsequent amendments could, therefore, become indispensable. See Benson & Coleman vs. Dyer, 69 Ga., 190; Code, §457; 61 Ga., 134, 388; 62 Ib., 683.

Judgment affirmed.

## RAWLINGS vs. Robson.

- 1. Where one signs a note with his own name, and nothing appears upon its face to show that he is acting for another, he will be held liable; and so also where one signs for another, for whom he has no legal authority, as where he adds to his own name the word administrator, executor, guardian, or merely agent, the obligation is held to be a personal one. Where such principal is distinctly indicated, and the contract is substantially in his or her name, the principal, and not the agent, will be liable, if the agent has the right to bind the principal, but the particular form in which the principal is indicated is immaterial.
- (a.) Therefore if a husband signed a note, "J. A. Robson, agent for his wife," such signature sufficiently indicated that the debt was that of the wife, and that the husband was her agent; and the failure upon her part to plead non est factum may well be construed into an implied admission of his authority to make it. And parol evidence was admissible to show who the wife was.
- 2. Where a husband contracted a debt on behalf of his wife, and gave a note therefor signed by himself as her agent, such note was not payment of the debt, in the absence of any express agreement to so receive it.

April 17, 1883.

Principal and Agent. Husband and Wife. Contracts. Promissory Notes. Payment. Before Judge CARSWELL. Washington Superior Court. September Term, 1882.

Reported in the decision.

HINES & ROGERS, for plaintiff in error.

Rawlings vs. Robson.

## E. S. LANGMADE, for defendant.

## CRAWFORD, Justice.

This suit was brought against Georgia Robson, the defendant, to recover of her \$360, for six tons of commercial guano. She was sued upon a note given therefor, which was signed "J. A. Robson, agent for wife," and also upon account for guano for the same amount called for by the note.

When the case was called for trial, the court, on motion of defendant's counsel, dismissed it upon the grounds:

- (1.) Because the note sued upon was the note of J. A-Robson, and not that of his wife, Georgia Robson.
- (2.) Because the account sued upon was settled by the note, and could not be sued upon.

We think that the court erred in dismissing the suit, on both grounds.

1. Where one signs a note with his own name, and nothing appears upon its face to show that he is acting for another, he will be held personally liable. And so, too, where one signs for another for whom he has no legal authority, as where he adds to his own name the word administrator, executor, guardian, or where he simply adds the word agent, the obligation is held to be a personal one. But in this case whilst J. A. Robson signs his own, instead of his wife's name, it is clear that the intent was to sign for and bind the wife, and that the contract was for her We think that this paper shows two material facts; one, that the debt was the wife's; the other, that he was her agent to make it. And the failure upon her part. when sued thereon, to plead non est factum, may well be construed into an implied admission of his authority to make it.

Where the principal is distinctly indicated, as in this case, on the face of the paper, such principal, and not the agent, will be the party liable. The rule, however, is that this must appear in some way; the particular form in

## Heard ve The State of Georgia.

which it is done is immaterial, if it in fact be done for the principal, and substantially in his or her name, that will be sufficient. Of course such liability will always depend upon the right of the agent to bind the principal; but wherever it exists, and the paper shows that he is acting for the principal and not for himself, the principal will be bound. The note here sued, on its face forbids the conclusion that J. A. Robson was the principal; it shows that he was only an agent, and at the same time for whom he was agent. This much appearing in the paper itself, authorizes the admission of parol evidence to show who the wife was, for it is no attack upon the writing to do this by additional testimony. See 16 Ga., 458; 56 Ib., 258; 10 Wend., 292; Parsons Notes and Bills 92, 95, 102; 39 Ga., 35.

2. Upon the second ground of the defendant's motion to dismiss the plaintiff's suit, we think that the court also erred. Section 2867 of the Code declares that bank checks and promissory notes are not payment until themselves paid.

In the case of Weaver vs. Nixon & Wester, decided September term 1882, this court held that, "A bill, acceptance or promissory note, either of the debtor or of a third person, is no payment or extinguishment of the original demand, unless it is expressly agreed to receive it in payment."

Let the judgment of the court below be reversed.

## HEARD vs. THE STATE OF GEORGIA.

- 1. The verdict finding the defendant guilty of voluntary manslaughter is not contrary to law or unsupported by the evidence.
- An exception to a charge of the court which is, in part at least, correct, should specify wherein it is unsound.
- (a.) Taken in connection with the charge of the court on the subject of reasonable doubts, there was no error in the following charge: "Mathematical certainty is not required in legal investi-

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gations. All that is required is moral certainty. Are your minds and consciences satisfied that the charge is true? If so, it is sufficient to authorize conviction."

- Where exception is taken to a long extract from the charge of the court, a portion of which is clearly correct, it should be specified what portion is not correct, or why the giving of it as a whole waerroneous.
- 4. While the charge might have been more particular in separately presenting the different phases of this case, as disclosed by possible views of the evidence, and in applying the law separately to each, in its totality, it was not such as to confuse and mislead the jury in regard to what would justify the defendant in killing another in defence of life, or to prevent a felony of less magnitude on her person.
- 5. In all cases of self-defence, whether it be of life or limb, or of any threatened felony on the person of the accused, the law of justifiable homicide in this state is, that it must be made to appear that it was absolutely necessary to kill the deceased, in the opinion of the slayer, founded on good reason, in order to save life or prevent a felony on his person; and also, either that the deceased was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was stricken.
- (a.) It might have been better to have omitted all reference to defence of habitation, but the mention of it in defining justifiable homicide will not cause a new trial.

March 27, 1883.

Criminal Law. New Trial. Verdict. Charge of Court Before Judge Willis. Marion Superior Court. October Term, 1882.

Reported in the decision.

BLANDFORD & GARRARD, for plaintiff in error.

THOMAS W. GRIMES, solicitor general, for the state.

Jackson, Chief Justice.

The defendant was tried and convicted of the crime of voluntary manslaughter, and, being denied a new trial, brought the case here for review.

### Heard re The State of Georgia.

1. The first ground of the motion is, that the verdict is contrary to law and the evidence. The evidence shows a fight between the parties, who were brother and sister, springing out of the brother having put the sister's child, a little boy, in a hog-pen, and ordering him to catch a hog, struck the child, it seems, with a little switch, when it cried, and the mother came out, and the fight ensued. It continued for some time in the yard, and in the house afterwards, when the brother came out and got a stick, and the sister came out with the gun. The brother wrested it from her and struck her with the stick; thereupon, she wrested it again from him, and, stepping back one step, the gun was fired, and the brother was shot in the bowels, and died in three-quarters of an hour. This evidence is sufficient, we think, to sustain a verdict of voluntary manslaughter, and the verdict is not contrary to the law or unsupported by the evidence.

There is testimony that the brother struck the defendant over the head with a rock, when he had her down; but it is in proof that no bruise was on her head of any sort. She threatened to kill him with the gun, and in her statement said only that she was obliged to kill him to save her own life. So that the entire testimony, taken together with the statement, makes a clear case of voluntary manslaughter.

2. The first exception to the charge is that the court erred in saying to the jury that "mathematical certainty is not required in legal investigation. All that is required is moral certainty. Are your minds and consciences satisfied that the charge is true? If so, it is sufficient to authorize a conviction."

It is not specified what part of this charge is erroneous. Certainly the first sentence of it is not. The second sentence is equally free from fault. The third and fourth, when construed in connection with the other two and that part of the charge which explains and charges the doctrine of reasonable doubts, are equally sound. Under the rule



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that, where a part of the charge excepted to is sound this court cannot reverse the judgment on that assignment of error, unless it specifies the unsound part, there is nothing in this ground of the motion which is tenable at all. Even, however, if each sentence could be considered as a separate exception and assignment of error, the above charge would stand, when construed in connection with the charge, on reasonable doubts.

- 3. The other ground is liable to the same criticism. It is still more vulnerable. It is as follows:
- "Justifiable homicide is the killing of a human being. by commandment of the law, in execution of public justice.—That is not insisted upon in this case.—By permission. in advancement of public justice, which is not insisted In self-defence, or in defence of habitation, property or person against one who manifestly intends or endeavors. by violence or surprise, to commit a felony on either. In order to justify a person in taking the life of another, it must be to prevent a felony being committed upon himself or upon his habitation, and a felony, under our law, is any crime that is punishable by confinement in the penitentiary or by death. Now, to justify a party in taking the life of a human being, under our law, it must be done to prevent a felony being committed, either upon his person or habitation, or it must be done under circumstances to justify a reasonable man in believing that one of these offences was about to be committed.
- "Now, in this case, did the prisoner take the life of the deceased to prevent a felony being committed upon person or habitation? Or did she take it under circumstances that would justify a reasonable man in believing that such an offence would be committed? If so, then she would be justifiable in taking the life of the deceased. A bare fear of these offences, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable man, and

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that the party killing really acted under the influence of those fears, and not in a spirit of revenge. If a person kill another in his defence, it must appear that the danger was so urgent and pressing at the time of the killing, that, in order to save his own life, the killing of the other was absolutely necessary, and it must appear that the person killed was the assailant, and that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given."

No error is specified in this long extract from the charge. Some of it is clearly right. It is the language of the Code. Unless all be wrong, it cannot be considered, because it is not specified in what part of it it is wrong. It is not specified that the objection to it is that it is not apposite as a whole, or otherwise erroneous as a whole, or what part of it is so. That a party excepting must specify, is provided by the Code, and decisions of this court, without number, are to the same effect.

4, 5. The next ground is: "Because the charge of the judge to the jury was calculated to confuse and mislead the jury on the subject of justifiable homicide."\* We do not see very clearly wherein it was so calculated. fendant herself, in her statement, put her defence on the sole ground that she was obliged to kill her brother to That rendered it necessary that the save her own life. judge should charge the law of self defence, against one who was trying to kill the defendant; and this was done as the Code clearly lays it down. But the facts might have shown, and really did show, that the deceased was not trying to kill the defendant; for when he got the gun from her he did not, yet could if he wished, as a witness for the defence swore; but, possibly, with a rock or stick, to maim her or commit a felony upon her was his intention. Therefore it became necessary that the court should charge the law on that branch of the case. While, therefore, the charge may have been more particular in separately pre-

<sup>\*</sup> See charge set out in previous division of decision. As to the word "and," used there, see end of decision. Compare Adams et al. vs. State; Mitchell vs. State, (September Term, 1888.)

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senting these different phases of the case, as disclosed by possible views of the evidence, and applying the law separately to each, we cannot see that, in its totality, it was such as to confuse and mislead in regard to what would justify her in defence of her life or a felony of less magnitude on her person.

The general rule on this subject is laid down clearly in Stiles vs. The State in 57 Ga., 184. There it is ruled that "in a contest or personal rencounter between two persons." where defendant set up the plea of acting in self-defence, sections 4331 and 4333 of the Code should be construed together; and it must not only appear that the circumstances were sufficient to excite the fears of a reasonable man, and that the party killing really acted under the influence of such fears, and not in a spirit of revenge, but it must also appear that the slaver thought and believed, and had good reason to think and believe, that the danger was so urgent and pressing, at the time of the killing, that in order to save his own life, or prevent a felony on his person, the killing of the other was absolutely necessary; and it must appear also, either that the person killed was the assailant, or that the slaver had really and in good faith endeavored to decline any further struggle before the mortal blow was given." And in the case of Wilson vs. The State, not yet reported,\* it was ruled that "section 4330 provides that one may kill another in self-defence, or in defence of habitation, property or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony on either. Section 4331 simply provides that a bare fear shall not be sufficient to justify such killing, and lavs down the rule as to what shall be Section 4332 defines what will justify a homicide in defence of habitation, property or person where a felony is attempted by violence or surprise or either, and concludes with this qualification, but it must appear that such killing was absolutely necessary to prevent the attack and invasion, and that a serious injury was intended or

<sup>\*69</sup> Ga., 224.

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might accrue to the person, property or family of the person killing. Section 4333 provides that, to make a homicide justifiable upon the ground of self-defence, it must appear that the danger was so urgent and pressing at the time of the killing, that, in order to save his own life, the killing of the other was absolutely necessary, etc. Thus it is clear that the qualifications in either case, to justify a homicide, must be made to appear as declared in -§\$4332 and 4333, as they bear upon self-defence, or defence of habitation, property or person defined in §4330."

So that in all cases of self-defence, whether it be of life or of limb or of any threatened felony on self, the law of justifiable homicide in this state is, that it must be made to appear that it was absolutely necessary to kill the deceased, in the opinion of the slayer founded on good reason, in order to save his own life or prevent a felony on his person, and also, either that the deceased was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was stricken.

This was a personal rencounter. The only justification is self-defence of life or limb, or other felony on the person; and the charge is substantially in accordance with this law. In extracting from the Code, the judge is made once to use the copulative conjunction in place of the disjunctive, "and" instead of "or," where he says it must appear that the deceased was the assailant "and" that the slayer really and in good faith endeavored to decline any further struggle, etc. But in the charge itself it is marked extracted from the Code, and is evidently a clerical error of the reporter or copyist.

It might have been better, too, to leave out all about defence or habitation, but the judge was merely defining justifiable homicide and following the Code, and could hardly avoid it.

Judgment affirmed.

Mason et al. ve. Atlanta Fire Company Number 1.

## - MASON et al. vs. ATLANTA FIRE COMPANY NUMBER 1.

[This case was brought forward from the last term under \$4271 (a) of the Code.]

- 1. The right to the whole estate of a decedent, and to recover the same from third persons, is primarily in the administrator. If there is none, the heirs may sue for realty; or the administrator may consent to a suit for realty by the heirs, or may assign a claim to a creditor or distributee, if he be unwilling to sue; but without some special reason, a suit in equity cannot be maintained by creditors, distributees or legatees for the recovery of property of the decedent from a third person.
- (a.) That funds are in danger of being distributed and passing into the hands of insolvent and irresponsible persons, furnishes no excuse for a want of indispensable parties.
- (b.) Complainants having no right of action at the commencement of their suit, could not maintain it by a right acquired during its pendency, as by then obtaining letters of administration.
- 2. A volunteer fire company was chartered by act of the legislature. Its officers were to be commissioned by the governor. It had no stock or subscription by its members, and its property was such as was acquired by donation. The only compensative of the members was relief from jury and militia duty. A member died, and some fifteen years thereafter, there having been no administration, there was a fund arising from the sale of property of the company in which his heirs claimed an interest, and to assert which they filed their bill:
- Held, that they had no right to participate in the fund, either during the existence of the corporation or after its dissolution.
- There is nothing here to which the statute of limitations can apply. February 27, 1883.

Actions. Administrators and Executors. Title. Corporations. Before Judge HILLYER. Fulton County. At Chambers. October 6, 1882.

Mrs. Mason filed her bill on behalf of herself and her minor children against the Atlanta Fire Company No. 1. alleging, in brief, as follows: In 1850 the company was incorporated by the legislature, under the name of the Fire Company of the City of Atlanta. They were to elect their own officers, who were to be commissioned by the governor. The members, not exceeding thirty in number, were to be exempt from jury duty, and, except in case of

### Mason et al vs. Atlanta Fire Company Number 1.

war, from militia duty. The length of time for the continuance of the corporate privilege was not prescribed. By act of 1854, the membership was increased to sixty, and the name changed to the Atlanta Fire Company No. 1: perpetual succession was given, with the right to have a seal, to sue and be sued, to form a constitution and adopt They subsequently adopted a constitution and by-laws, which provided for the election of members, their duties, their expulsion, the dropping of them from the roll for delinquencies, the election of officers, etc. No provision was made, either in the charter or in the constitution and by-laws, for the acquisition of property; but from the collection of dues from the members and by voluntary donations, fairs, festivals, excursions and other public and private entertainments, a considerable amount of money was raised and invested in real and personal property for the use of the company. Mason, the husband of complainant, was a member of this company, and by his zeal, skill and energy, contributed more to the creation of this fund than any other one member. He died October 21, 1867, being at that time an active member in good standing, with all his dues paid and a clear record on the company's book. In 1882, the system of fire service in Atlanta was changed, the volunteer service being discontinued and a paid department being organized. This company, therefore, was dissolved, or at least the object of its incorporation ceased. They have sold their personal property for an amount not known to complainant, and their real estate for \$10,300, and the present living members of the company are about to distribute the money without regard to the rights of the widows and orphans of deceased members. If the fund is so distributed, it will, in a large measure, go into the hands of persons who are insolvent and cannot respond to any judgment complainant may recover. The prayer was for an accounting between living members and the representatives of deceased members, for the appointment of a receiver to take charge Mason et al. vs. Atlanta Fire Company Number 1.

of the fund, and injunction to prevent its being paid out until the rights of complainant could be ascertained.

Defendant demurred to the bill, (1) because complainant disclosed no right in herself to assert the supposed cause of action, and (2) because there was no equity in the bill.

Defendant also filed an answer, the statements of which differed from those in the bill in the following particulars; Defendant acquired from the voluntary sources stated in the bill such property as was necessary to it for fire purposes. The city of Atlanta has abolished the volunteer fire system. It is not true that defendant has dissolved or surrendered its charter and franchises. The property being no longer needed, was sold, the proceeds of the sale of the personalty (which was acquired since 1867) have been divided among the members. No action has been taken with reference to a division of the money arising from the real estate. Defendant insists that at his death Mason ceased to be a member, and denies that either be or his estate had any interest which survived him.

The injunction and receiver were denied, but a temporary injunction was granted to restrain the paying out of \$300 until the case could be heard in the Supreme Court. Plaintiff excepted.

GEORGE T. FRY; REED & WHITE, for plaintiff in error. cited, on the statute of limitations, Code, §§2928, 3196; 36 Ga., 575; 1 Ga., 379, 538; 6 Ib., 310; 22 Ib., 108. On the nature of the corporation and interest of members, Field Corps., §§69, 123; Mor. Corps., §§381, 662, 401, 403, 405, 343, 217; Code, §1688; 62 Ga., 695.

HOPKINS & GLENN, for defendant, cited, on the statute of limitations, Code, §\$2918, 2928. Administrator should sue, Code, §2483. On division of assets, Code, §1688; Ang. & Ames Corp., §195; 38 Cal., 174; 5 Ga., 242; 53 Ib., 628.

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# HALL, Justice.

1. The first question to be considered is whether there are any parties to this bill. Complainant sets up a claim, in behalf of herself and children, to the deceased husband's right to participate in a fund arising from the sale of property belonging to a fire company, of which he in his lifetime had for many years been an active and prominent member. When this proceeding was commenced, he had been dead for more than fifteen years, and during all that time there had been no representation upon his estate.

This is a suit concerning personal property, and by the Code, \$2483, upon the death of the owner, the title to real property vests immediately in his heirs at law, but the title to all other property vests in the administrator of his estate for the benefit of heirs and creditors, and it has been repeatedly decided that legatees, creditors and distributees can recover personal property only through an executor or administrator. 12 Ga., 278. Upon the appointment of an administrator, the right to the possession of the whole estate is in him, and so long as such administration continues, the right to recover possession of the estate from third persons is solely in him. If there be no administration, or if the administrator appointed consents thereto, the heirs at law may take possession of the lands, or may sue therefor in their own right. Code, §2485. Where the administrator declines to sue, he may assign the claim to a creditor or distributee, who may, at his own expense, prosecute the suit; but if he recovers, the proceeds, after paying expenses of suit, are to be distributed by the administrator. Code, §2536. Without some special reason, a suit in equity cannot be maintained by a creditor, distributee or legatee, for the recovery of property from a third person. 61 Ga., 602, 607; 8 Ib., 356; 25 Ga., 252. No such ground for equitable interposition, as the above cases hold necessary, is alleged or shown in this case.

The emergency set out and relied upon here, viz: the

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pressing danger of immediately distributing these funds and placing them in the hands of insolvent and irresponsible persons could not dispense with indispensable parties. This emergency could have been met by letters of administration ad colligendum, (Code, §2487), and such administrator could obtain an injunction when necessary (24 Ga., 131), and also institute a suit for collecting the effects of deceased, to which a permanent administrator, when appointed, might become a party. 50 Ga., 264.

The complainants having no right of action at the commencement of the suit, could not maintain it by a right acquired during its pendency (55 Ga., 329), as by then obtaining either temporary or permanent letters of administration.

2. This, however, was a corporation in which members held no stock, they were only members of it while they lived and belonged to the organization; and when they died. they left nothing that their heirs could inherit, or that could have been transmitted by will. While in life, they had nothing which they could sell or assign. It was not a trading, commercial or ordinary business corporation, or anything like it. Its property was acquired, not by subscriptions paid in by its members, who took certificates of stock, but by donations made by public spirited and patriotic citizens; whether the contributions came through fairs, concerts or otherwise, still they were donations for a great public object. Membership was not obtained by reason of any contract, or held by virtue of any vested right springing from a contract; it could only be obtained by the will of those composing the company; they acted under charter from the legislature of the state; the offcers they elected were to be commissioned by the governor; the only compensation they received for the public duties required of them, was exemption of their members from jury duty and from militia duty (Act of 23d February, 1850); and, by their amended charter, their original number was increased from thirty to sixty; they were de-

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clared a body corporate, under their present name; had perpetual succession of officers and members; power was given them to sue, etc., to have a common seal, to establish, change and amend their constitution, and to make bylaws, etc. Act 10 January, 1854.

The view we take of this case renders it unnecessary to determine whether this is a public or a private corporation; whether it is dissolved by the change and transfer of the service it was created to render, to others, authorized by the public authority to perform them, or whether it still exists as a body corporate, although it has ceased to render the services for which it was created or to exercise any of its franchises, and has, by such non-user, incurred a forfeiture; or what will become ultimately of the property belonging to the corporation, upon its dissolution or the forfeiture of its charter. The only question we need to determine is as to the right of these complainants to participate in its property during its existence, or after its dissolution.

In a case where it was apparent that the funds of the corporation consisted entirely of private donations, it was deemed unimportant to ascertain who were the donors, for the reason that if they or their descendants could be ascertained, they had no interest in the subjectmatter, having parted with the property thus bestowed; neither had those for whose benefit the donations were intended any such interest. "The gifts were made, not indeed, to make profit for the donors or their posterity, but for something, in their opinion, of inestimable value; for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated, is the perpetual application of the fund to its objects, in the mode prescribed by them-Their descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives." Dartmouth College vs. Woodward, 4 Wheaton, 632, 642, 643.

In the case of The People vs. The President and Trustees

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of the College of California, 38 Cal. R., 173, Crockett, J., in a well considered and ably argued opinion, says: "The fact that a portion of the funds of the college were the result of voluntary donations to it, can, in no degree, impair the power of the trustees to surrender its franchise and dispose of its property in the manner proposed," i. e., to bestow on another institution of learning similar in its objects but of larger capacity for usefulness. "The donors must be presumed to have known the law, and must be held to have assented in advance to any lawful exercise of power in good faith, by the president and trustees, in respect to the corporate franchise and property. In addition to this, the donations were absolute and unconditional. retained no interest, present or future, in the sums donated, nor acquired thereby any interest whatever in the corporate property, nor any right to control it. The donations were voluntary offerings by patriotic citizens in aid of the cause of education; and the management and disposition of the fund was confided absolutely to the president and trustees, subject only to such limitations and restrictions as the law imposed upon them. \* \* \* That the trustees have the power to surrender the franchise after its debts are paid, is a proposition that admits of no doubt; and if they should do so without having made any disposition of its property, there being no stockholders or creditors, the personal property would vest in the state. 2 Kent, Comm., 386; Angel & A., Corp., §195. Such real estate as remained undisposed of, and which had been acquired by donation, would revert to the donors. But this rule would not apply to real estate acquired by the corporation by a purchase for value. In such cases the vendor has no further interest in the property or in its application, and on a dissolution of the corporation, if there be no stock holders or creditors, the title would vest in the state in the same manner as if it were personal property. This point was under discussion in Bacon vs. Robertson, 18 How., U. S. R., 480; and, in delivering the opinion of the court,

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Mr. Justice Campbell says: 'The acquisitions of real property by a trading corporation are commonly made upon a bargain and sale, for a full consideration, and without conditions in the deed, and no conditions are implied in law in reference to such conveyances. The vendor has no interest in the appropriation of the property to any specific object, nor any reversion where the succession fails.' We are satisfied this is the true rule. If the College of California, therefore, had surrendered its franchise, owing no debts, all its personal estate then remaining and all its real property acquired by purchase for value, would have vested, by operation of law, in the state."

Upon this subject, see 5 Ga., 242; 53 Ib., 628; Code, \$1688, cited by counsel for defendant in error. As to surrender of franchises, Code, \$1686. As to when forfeiture is incurred and how it is effected, Ib., \$1685.

3. We will only add that there is nothing here to which the statute of limitations can apply.

Judgment affirmed.

## MOORE vs. CITY OF ATLANTA.

[This case was brought forward from the last term, under \$4271 (a) of the Code.]

- 1. The act of the legislature which gave to a land owner in Atlanta the right to have a permanent grade, required, as a prerequisite to its value as vesting a right in him, that it be filed for record. Having failed so to do, he could neither recover damages, under that act, from the city, resulting to his lot from a change in the grade of the sidewalk, nor enjoin the municipal authorities from making such change.
- Ignorance of the law and inadvertence do not jointly or severally commend a suitor who seeks relief in a court of law or equity; never, where the strong remedy of injunction is sought.
- 3. If any owner of property be damaged by the grading of a street so as to lessen the pecuniary value of such property, he may recover damages for such injury to his freehold. That damage will be measured by the decrease in the actual value of the property. Increase of value resulting from such improvements may be set off against the damages proved, the right of recovery turning in each

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case on the decreased pecuniary or market value of the property caused by the grade.

- 4. The grading of streets should not be stopped, and extensive municipal improvements prevented by injunction, because of damage which would result to the owner of a lot bordering on the street.
- (a.) There is a broad distinction between cases of this character and those in which possession of, and dominion over, private property is taken for public use, like Chambers vs. Cincinnati and Georgia Railroad, 69 Ga., 320.
- On an application for an injunction, questions of fact are for the chancellor.
- (a.) If the authorities of the city were using their official power in behalf of the individual profit of themselves or others in collusion with them, at the expense and to the damage of other citizens, the courts would interfere to stop such conduct. But as the charge would involve a deep degree of moral turpitude, the proof should be correspondingly strong and certain.
- It is evident that the authorities are moving to secure the change of grade.

March 27, 1883.

Municipal Corporations. Damages. Constitutional Law. Streets. Injunction. Before Judge Hammond. Fulton Superior Court. September Term, 1882.

Reported in the decision.

CANDLER & THOMSON, for plaintiff in error.

W. T. NEWMAN, for defendant.

Jackson, Chief Justice.

This bill was brought by the complainant against the city of Atlanta to enjoin the municipal authorities from grading a street in front of the residence of the complainant, on the ground that the grade had been fixed by the city some years ago; that complainant had neglected a record it pursuant to law, but had acted upon it as fixed had planted shade trees on the sidewalk, which had be come of great value, and would be destroyed if the grade proposed was carried out; that it was projected as

#### Moore w. City of Atlanta.

in the interest of certain persons owning property in the neighborhood; that there was really no necessity for it, and that its result would work irreparable injury and damage to the complainant. The injunction was refused by the chancellor, and the complainant excepted.

We have held up this case for some time, with a view to look closely into the bearing which the constitution of 1877, and the decision of this court thereunder in the case of *The City of Atlanta vs. Green*, made at the September term, 1881, and not yet reported,\* might have on the law of the case. Outside of that bearing, the case would have given us comparatively little trouble.

- 1. The act of the general assembly which gave complainant the right to have a permanent grade, made, as a prerequisite to it value as vesting a right in him, that it be filed for record. Acts of 1871-2, p. 301. Complainant admits that he did not record or file the grade which he procured to be given him as permanent in 1873, and therefore acquired no rights under it; nor could he, under that act, recover damages from the city, much less enjoin it from grading the streets, so far as that act confers rights upon him.
- 2. Nor does complainant give any reason for failure to record the permanent grade, alleged to have been given him by Mr. Bass, the city engineer in 1873; but "from ignorance or inadvertence," it was not filed for record-Ignorance of the law and inadvertence, both or either, do not commend a complainant who seeks relief in a court of law or equity; never in a court of equity, where the strong arm of injunction, which courts of equity alone can use, is invoked by the suitor.
- 3. Therefore the rights of complainant must rest on the constitutional provision of the convention of 1877. That provision is that, "Private property shall not be taken or damaged for public purposes, without just and adequate compensation being first paid." Art. 1, sec. 3, par. 1; Code, §5024.

In the case of The City of Atlanta vs. Green, supra, it

<sup>\*67</sup> Ga . 886.

#### Moore vs. City of Atlanta.

was held that this constitutional provision was applicable to cases of injury or damage to property caused by grading the streets, without reference to the point whether or not the act of 1871, in regard to permanent grades previously granted and recorded, was complied with, and the effect of not recording. It was ruled there distinctly, and it is now well settled law in this state, that if any owner of property be damaged by the grading of a street, so as to lessen the pecuniary value of his property, he may recover damages for such injury to his freehold. That damage will be measured by the decrease in the actual value of his prop-If the value pecuniarily be not decreased, he can recover nothing. If it would have been decreased in value as a mere residence, without regard to the improvement of access made by the grade of the street, and yet this improvement and the increased value thereby produced equaled the inconvenience or discomfort of the home as a mere residence, then the one could be set off against the other, and no recovery could be had. In other words, the right of recovery would turn in each case on the diminution in the pecuniary or market value of the property caused by the grade.

Weighed in these scales, how will the case at bar stand on the mere question of damage? Will the complainant's property be decreased in value, and if so, how much! That much, little or large, he will be entitled to recover at law under the ruling in the case of Atlanta vs. Green, before cited.

4. But the stoppage of all the improvements of the city by the stern writ of injunction is another and vastly more important question. Has he or any other citizen the right absolutely to stop the entire system of grades of a whole street, or of two streets, because his property will be damaged if the contemplated improvement, in the judgment of the authorities, be carried into effect? Is it not better that one man's property be incidentally damaged than that the city authorities be absolutely prohibited from

# FEBRUARY TERM, 1883 Moore us. City of Atlanta.

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of the plaintiff was about to be made by the railroad, and the court stopped the act of seizure until compensation was made. In that class of cases, too, a mode is provided for assessing damages before the right of way can be had,—in the class of cases before us, there is none.

5. Questions of fact here, as in all applications for injunction, are for the chancellor below. We do not pass upon them unless his discretion be abused.

In this case, Mr. English, the then mayor of the city, and Mr. Rice, a contractor, are implicated by charges in the bill as urging this grade for individual profit and emolument; but they deny on affidavit all intimations of the sort. The chancellor could hardly do otherwise than accept this explicit denial, as there is no positive evidence to the contrary. The intimations in the bill stand alone and unsupported in the record. If the authorities of the city were using their official power in behalf of individual profit of their own, or of others in collusion with them, at the expense and to the damage of other citizens, the courts would soon find means to put a stop to all such conduct; but as the charge would involve a deep degree of moral turpitude, the proof should be correspondingly strong and certain.

6. We see nothing in the point in regard to the action of council; their order to the commissioners of streets, and subsequent reference to a committee and its non-action. It is evident that the city is moving in behalf of this grade with all its might. It defends the bill by its attorney; it surveys and fixes it by its engineer, and there is no doubt that all its authorities are moving to secure it.

On a careful consideration of the whole case, we see no course for this court, under the principles of equity applicable to the facts, but to affirm the denial of the writ of injunction.

Judgment affirmed.

## BAILEY vs. THE STATE OF GEORGIA.

- 1. There was no error in charging, in a criminal case, that it was necessary to lay before the jury certain rules of law, that they might apply the evidence delivered from the stand to such rules, and determine, from the law as given in charge by the judge and the testimony of the witnesses, of what crime defendant was guilty, if guilty at all. If defendant's counsel desired a more specific charge, to the effect that the jury were judges of the law and facts, it should have been asked.
- 2. To complete the crime of murder, it is not necessary that the deliberate intention to take life should exist for any particular length of time before the killing. If it entered the mind of the slayer a moment before he fired the shot, it is sufficient. It is deliberate intention at the time he makes up his mind to shoot, and if it exists only for that length of time, it is sufficiently long.
- (a.) Legal malice is not ill will or hatred. It is an unlawful intention to kill, without justification or mitigation; and it is not necessary for that intention to exist for any length of time before the killing.
- 3. There was nothing in the charge of the court on the subject of the insufficiency of provocation by words, menaces, threats or contemptuous gestures, to free the slayer from the guilt of murder, that could be construed into an expression of opinion by the court.
- (a.) Nor was undue and hurtful prominence given to this portion of the charge by the fact that the presiding judge thought proper to say this, not only to the jury, but to the "people out there," (the spectators,) "under the solemn sanction of his oath," or in the addition that "he wished the people of the county to understand that nothing a man could be called would authorize him to take life." If error at all, no harm was done to defendant thereby which would require a new trial.
- 4. Construed together, the charge of the court was quite as favorable to the defendant as he could have asked, if indeed not more favorable than the law authorized.
- (a.) The making of threats by the deceased to injure the defendant in some way, would not constitute the deceased the assailant or make such a case of necessity under the law as would justify the killing. Threats to hurt or injure the defendant in some way do not make the danger so urgent and pressing at the time of the killing as to render the killing absolutely necessary to save the slayer's own life.
- 5. The defendant has had a fair and impartial trial, the law has been most benignantly administered, and the evidence fully sustains the verdict.

March 27 1883.

Criminal Law. Charge of Court. Practice in Superior Court. New Trial. Before Judge Simmons. Bibb Superior Court. October Term, 1882.

Bailey was indicted for murder. On the trial, the evidence for the state showed, in brief, the following facts: Tatum, the deceased, kept a bar and store. There was a society meeting in progress upstairs over the store, and Bailey was in attendance upon it. He came down and gave Tatum a dollar to be changed. The latter told him to come back into the bar-room and get the change. Before the change was given, some one called the attention of Tatum to the front, and he asked Bailey to wait on him until he attended to his customers. He then went forward, leaving Bailey in the bar-room. When he returned, he stated that one dollar and seventy-five cents had been taken out of the drawer, and no one had been in there at that time but Bailey. He also declined to give any change until he found the missing money. Bailey insisted upon having his change, and Tatum refused to give it. Finally Tatum stated that he would go upstairs and get a fivedollar bill changed in order to stop the fuss. Each agreed to hush, but as Tatum started towards the door, Bailey began quarreling again, and finally stepped between Tatum and the door, and as Tatum turned, shot him, causing death.

No witness testified to seeing any weapon about Tatum or in the store. The prisoner relied upon his statement, and in it asserted that Tatum had cursed and reviled him and finally stretched out his hand to get a pistol which was lying upon one of the shelves, and as his hand reached the pistol, defendant shot him.

The jury found the defendant guilty. He moved for a new trial, on the following among other grounds:

(1.) Because the court charged as follows: "It is necessary for me to give you certain rules in charge, that you may apply the evidence that has been delivered from the stand under oath to those rules, and determine from the

law which I give you, and the testimony of the witnesses, of what crime this man is guilty, if he is guilty at all."

- (2.) Because the court erred in the following charge to the jury in regard to the intention to kill: "It is not necessary, however, that this deliberate intention should exist for any particular length of time before the killing. If it enters the mind of the slayer the moment before he fires the shot, that is sufficient. That is deliberate intention at the time he makes up his mind to shoot and shoots. If it is only that long, it is sufficient in the law."
- (3.) Because the court erred in the following charge to the jury: "Now you remember the Code says provocations by words, threats, contemptuous gestures, shall not be sufficient to reduce the crime from murder to manslaughter. I wish to say to this jury and the people out there that the law of Georgia is, that no words that a man can say to another, no menaces, no contemptuous gestures, that he can make towards another, will be sufficient to reduce the crime of murder to manslaughter. I say this under the solemnity of my oath, and I wish the people of this county to understand it, that nothing you can call a man authorizes that man to take life." [The following note was appended by Judge Simmons to the above ground:

"Homicides have been frequent in this county. The general idea has been that a man had a right to kill for words. Counsel for the prisoner had argued to the jury that they were the judges of the law as well as the facts, and he asserted positively to the jury that the prisoner had the right to take life because the deceased had called him a damned son of a bitch. The court room was crowded with ignorant colored people. I desired to correct the impression made on their minds by the able counsel, as well as the minds of the jury. Hence the charge in the third ground."

- (4.) Because the court failed to charge the jury that they were the judges of the law, as well as the facts, in criminal cases.
- (5.) Because the court erred in charging the jury as follows: "But I charge you that no motion that a man can make, throwing his hand behind him or putting it upon a

shelf to get a pistol, will justify a man in shooting him unless the circumstances show that the man who was making that motion presently intended to shoot the slayer—to shoot John."

The motion was overruled, and defendant excepted.

THOMAS WILLINGHAM; J. H. HALL, for plaintiff in error.

JOHN L. HARDEMAN, solicitor general; C. ANDERSON, attorney general, by Jackson & King, for the state.

HALL, Justice.

- 1. The court committed no error in charging the jury that it was necessary to lay before them certain rules of law, that they might apply the evidence delivered from the stand to such rules, and determine from the law, as given in charge by the judge, and the testimony of the witnesses of what crime the defendant was guilty, if guilty at all. It is true that he does not state to them in precise terms though he does so inferentially, that they are judges of the law and fact; but if the defendant had desired this latter charge, or if he was not satisfied with the statement of the law in that respect, he should have requested a more specific and precise charge upon the subject. This he failed to do, and it is now too late to take advantage of this omission. 64 Ga., 318; 28 Ib., 200; Wilson vs. The State 69 Ga., 224.
- 2. There was no error in the charge that it is not necessary that the deliberate intention to take life should end for any particular length of time before the killing; that if it enters the mind of the slayer the moment before in fires the shot, that is sufficient; it is deliberate, intentional at the time he makes up his mind to shoot, and if it entered only that length of time, it is sufficient in law. The statement of the law of malice aforethought, has been two often recognized by this court to admit of question of doubt, and is subject to no modification or qualification whatever. 3 Ga., 326; 11 Ib., 615. Nor can we concern

how error can be predicated of this instruction to the jury, that "malice is not ill-will or hatred, as most people suppose it to be. It is an unlawful intention to kill, without justification, or mitigation, and it is not necessary for that intention to exist any length of time before the killing." 26 Ga., 156; Ib., 276; 29 Ib., 607.

3. There was nothing in the court's charge to the jury upon the subject of provocation by words, menaces, threats, or contemptuous gestures, being insufficient to free the person killing from the guilt and crime of murder, that could be tortured into an intimation of opinion, as was supposed by counsel for plaintiff in error, that such was the proof in this case. Nor can we conclude with them, that undue and hurtful prominence was given to this portion of the charge by the fact that the presiding judge thought proper to say this, not only to the jury, but to the "people out there," i. e., the spectators, "under the solemn sanction of his oath"; or in the addition that "he wished the people of the county to understand that nothing a man could be called would authorize him to take life." In justification of his course, the cautious, experienced and able judge who tried this case says the idea had been prevalent that a man had a right to kill for words; that the counsel insisted, before the jury, that they were the judges of the law and fact, and that the prisoner had the right to take life, because the deceased had called him a d-d son of a b-ch; that at the time of these utterances, the court-room was crowded with ignorant colored people. and hence the admonition was deemed proper to correct a prevalent, pernicious and fatal error that might otherwise lead to lawlessness and bloodshed, upon the slightest provocation. It must be borne in mind that the defendant and deceased both belonged to the class of persons referred to, a class that can scarcely be reached by any other form of admonition than that adopted. His honor rightly thought it his duty to exert his influence for the preven-This is the main object of all punishment, tion of crime.

and it is certainly more in accord with the humane spirit of our law to prevent the commission of offences than to impose penalties to that end after they have been com-The course pursued on this occasion was unusual. and to that extent, perhaps, may have been irregular; but the circumstances attending the trial, and the state of feeling and opinion developed, it is to be hoped, were likewise unusual, if not exceptional. In delivering the opinion in Malone's case, 49 Ga., 218, Warner, C. J., said: "This court will avail itself of the present occasion to announce to the public from this bench, with all the emphasis which its judgment can impart, that provocation by words threats, menaces, or contemptuous gestures will, in no case. be sufficient to free a person who kills another by shooting him, from the guilt and crime of murder. The law so declares, and it is the imperative duty of the court so to administer it, for the protection of society and human life Mere words, threats, menaces or contemptuous gestures. are no considerable provocation, in the eye of the law, and therefore, malice shall be implied." A solemn warning to which this present bench would, if it were possible, impart increased force and emphasis. See, also, Roberts' case, 65 Ib., 430.

The admonition to the bystanders, if error at all, did not impose any additional burthen upon the defendant, invaded none of his rights, withheld from him no privilege to which he was entitled under the law, and, therefore worked no hurt which could justify the award of a new trial. 42 Ga., 609; 59 Ib., 189.

4. Nothing had been said in this case by any witness save by the defendant in his unsworn statement to the jury about any attempt upon the part of the deceased to get a pistol before the shooting, or about his reaching up to the shelf after one; and this statement of the defendant was contradicted by a witness introduced by the state. The judge charged the law as to the effect of the prisoner's statement as evidence, and charged, in addition, that if de-

ceased had a pistol in his hand, and was attempting to use it, or if one was lying near by, and deceased was attempting to get it from the shelf, or elsewhere, with the manifest intention to use it at that time, then defendant would be authorized to shoot to save himself. Thus far the charge was satisfactory to defendant, but to what follows in immediate connection he excepted, viz: "But I charge you that no motion a man can make, throwing his hand behind him, or putting it upon a shelf to get a pistol, will justify another in shooting him, unless the circumstances show that the man who was making that motion presently intended to shoot the slaver—to shoot John " (the prisoner). Taken in connection with what immediately follows, this charge, if not altogether correct, is more favorable to the defendant than he could have asked under the law. The jury were instructed that these were questions which the defendant must decide for himself, and must decide them in accordance with the law and facts, and it depended altogether upon these whether he would be justifiable or not; that if deceased had a pistol in his hand, and from his appearance or declarations, or things of that sort, he was going to use it, the defendant need not wait until he was shot, but could, under those circumstances, shoot first; but he must be sure, when he did shoot, that the law would justify him,—in other words, that the actions and declarations of the deceased tended to show that it was his purpose to shoot the defendant, unless the defendant first shot him; that the defendant must show that the circumstances were sufficient to excite the fears of a reasonable man. that unless he shot first, the deceased would shoot him; if they show that, then he would be justifiable, otherwise The court then read to the jury \$4333 of he would not. the Code: "If a person kill another in his defence, it must appear that the danger was so urgent and pressing at the time of the killing, that in order to save his own life, the killing of the other was absolutely necessary; and it must appear also, that the person killed was the assailant, or

that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given;" and continued to apply the section to the facts of the case, thus: "It must appear that the danger was so urgent and pressing at the time of the killing that it was absolutely necessary for defendant, in order to save his own life, to kill deceased; and it must also appear that deceased was the assailant, that he was making threats to hurt defendant, to injure him in some way; or if that does not appear, it would be sufficient that the slaver, the defendant, had really and in good faith endeavored to decline any further struggle, before the mortal blow was given. If that appears, it would be sufficient to justify the defendant." We cannot agree with our learned brother, "that the making of threats by the deceased to hurt the defend ant, to injure him in some way," would constitute the deceased the assailant or would make such a case of necessity under the law as would justify the killing. to hurt or injure the defendant in some way do not make the danger so urgent and pressing at the time of the killing as to render the killing absolutely necessary to save Besides, this statement is not entirely conhis own life. sistent with that portion of the charge which properly deals with the effect of words, menaces, etc. 65 Ga., 430; 50 Ga., 230; 25 Ib., 701; 57 Ga., 184, 187.

5. A careful examination of this record satisfies us that this prisoner has had a fair and impartial trial, in which all of his rights have been fully accorded; that the law has been most benignantly administered, and that the evidence fully sustains the verdict which has been rendered.

Judgment affirmed.

#### Mitchell vs. Wolfe.

## MITCHELL vs. WOLFE.

Under the constitution of 1868 there was no provision for supplementing a homestead or exemption; and where one obtained an exemption of personalty in 1874, he could not afterwards increase it by having other personalty set apart; nor did the constitution of 1877 and the act of 1878 confer the right to add to such previously granted exemption.

(a.) Were the meaning of the act doubtful, it would not be so construed as to impair rights growing out of contracts prior to its passage.

April 24, 1883.

Homestead. Constitutional Law. Before Judge PATE. Laurens Superior Court. August Adjourned Term, 1882.

Reported in the decision.

R. A. STANLEY; ROBERTS & SMITH, by brief, for plaintiff in error.

JOHN M. STUBBS, for defendant.

HALL, Justice.

The plaintiff in error applied for and obtained an exemption of personalty in 1874, under the homestead acts passed in pursuance of the constitution of 1868. In 1882. he sought to supplement this exemption and to have other personalty set apart, so as to increase the exemption before made to the maximum allowed to be set apart for this purpose. John B. Wolfe, who was a creditor notified, and who held a debt due before the first exemption was allowed, appeared and filed objections to this application to increase the former exemption. The ordinary overruled these objections and gave judgment in favor of the applicant. From this decision, the objector appealed to the superior court, and on the trial upon the appeal the jury returned a verdict in favor of the objector and against the applicant. A motion was made for a new trial, which

#### Mitchell vs. Wolfe.

was overruled, and the applicant brings the case to this court.

The only ground of objection to this application for an increase of homestead, and also of the motion for a new trial, which it is material to consider, is this: That the said plaintiff in error, on the 20th day of January, 1874, had set apart to him an exemption, under the constitution of 1868 and the law passed in pursuance thereof, and cannot now supplement the same. The proofs in the case fully sustained this objection; indeed, the fact was not put in issue, but was admitted both in the petition of the applicant to supplement the exemption and upon the trial.

Was this a proper verdict, denying the right of the party to supplement and increase this exemption as against the claim of the objector? We entertain no doubt that it was. In Pate vs. The Oglethorpe, etc., Co., 54 Ga., 515, this court held, in the year 1875, that there was then no provision of law for taking a second or supplemental homestead, although the former one taken was of less value than the maximum allowed by law; and in Woods vs. Jones, 56 Ib., 520, this case was cited and affirmed, and an order of the ordinary setting apart the second or supplemental homestead was declared to be without jurisdiction and void. Since these decisions were rendered, the constitution of 1877 was adopted, and article 9, §6, par. 1 of that instrument provides that the applicant shall at any time have the right to supplement his exemption, by adding to an amount already set apart, which is less than the amount therein (herein) allowed, a sufficiency to make his exemption equal to the whole amount. Code, 1882, \$5215. By the act of the general assembly, approved 16th of December, 1878, §4, Code, 2039 (c), provision is made for supplementing the exemption provided for by the above cited article of the constitution of 1877, as is apparent, not only from the title, but also from the general purport and tenor of the act. Pamph., p. 99. It is contended here that the only purpose of this act is to give a remedy for

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the assertion of a pre-existing right; that as such it retroacts upon exemptions set apart, under legislation previous to the constitution, and interferes with no rights of creditors. To this position, however, we do not assent. rights of creditors, who were such prior to the adoption of this article of the constitution, were fixed as to homesteads and exemptions set apart and allowed anterior to that date-The constitution does not provide a remedy merely; it gives a new and substantial right. This, if not quite manifest from the very words of the article, section and paragraph quoted, is rendered certain by the \$8, par. 1, of the same article, which declares that "rights which have become vested under previously existing laws, shall not be affected by anything herein contained." Code, §5217. That this is the meaning attached to the constitution by the legislature, we think is apparent from the words of the act of They are, that an exemption less than the whole amount "allowed by the constitution and laws of the state." may be increased to that amount. What constitution is here referred to? Was there any other than that of 1877 in existence at that time? Upon general principles of construction, it would not be just or proper to extend the terms of the constitution to other cases than those expressly mentioned, especially where such an enlarged signification might interfere with rights that had become vested under previously existing laws. Even if the intention of the framers of the constitution were less certain than we take it to be, we should not feel warranted in attributing to them a purpose to interfere in such a manner as to impair rights growing out of contracts. This case is within the principle laid down by the Supreme Court of the United States in Gunn vs. Barry, 15 Wall, 610.

The other questions made in the record may be dismissed with the remark that they have no practical bearing upon this case, and are in no manner essential to its final determination.

Judgment affirmed.

#### King we Ford.

#### KING vs. FORD.

Where an ordinance of a municipal corporation provided that owners of horses or mules should not permit the same to run at large within the corporate limits of the city, and subjected one violating its terms to fine therefor, if the city marshal impounded a mischievous horse running at large in the street, the owner could not proceed against him by possessory warrant.

(a.) By the common law, cattle wandering about damage feasant

might be taken up and impounded.

(b.) If the rights of the owner have been violated, she has a remedy, not only against the marshal, but against the municipality under whose orders he acts; but the remedy is not by possessory warrant. April 10, 1833.

Possessory Warrant. Actions. Officers. Municipal Corporations. Before Judge FAIN. Whitfield Superior Court. October Term, 1882.

Reported in the decision.

McCutchen & Shumate; Seth M. Walker, for plaintiff in error.

## R. J. McCamy, for defendant.

HALL, Justice.

The defendant in error made affidavit, by her agent, that she was lately in the peaceable, quiet and legally acquired possession of a certain bay mare colt, and that said colt had gone out of her possession without her consent, and had been illegally taken possession of by plaintiff in error under some pretended claim and without lawful warrant or authority, etc. Upon this complaint, a possessory warrant was issued and served upon the plaintiff in error. On the hearing before the magistrate, he justified himself by showing that, as marshal of the city of Dalton, he took possession of and impounded the colt in question for a violation of the city ordinance, to the effect that no person

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owning horses or mules should permit the same to run at large within the corporate limits of the city, and for a violation thereof the offender should be subject to a fine of one dollar; that the city charter gave power to the mayor and council to enact all ordinances deemed necessary to preserve the peace, health or good order and good government of the city, and to enforce all such ordinances not inconsistent with the laws of this state (§6 charter; acts 1874, pamph. 182). He also proved by several witnesses that the colt was continually running about the streets, to the annoyance of people; that she emptied wagons of their contents, and annoyed other stock hitched to wagons and at horse-racks; and by one of these witnesses that he had seen her kick three horses loose from their fastenings. This showing was not controverted; nevertheless the magistrate awarded possession of the animal to the defendant in error and mulcted the plaintiff in error in cost. decision was carried by writ of certiorari to the superior court, and upon the hearing thereof, that court ordered the certiorari to be dismissed, and the plaintiff in error to pay the cost of the proceeding.

This judgment is assigned for error here, and it insisted that, under these circumstances, the defendant in error had mistaken her remedy, if any she had; that a possessory warrant did not lie under the facts; that the mare did not disappear from her possession without her consent, nor was she taken possession of by the other party under some pretended claim and without lawful warrant or authority (Code, §4032); and we think this point well taken. In Mann vs. Waters, 30 Ga., 207, 209, Stephens, Judge, who delivered the opinion of the court, said: "Under the statute regulating possessory warrants, there is no question as to the title nor as to the right of possession; the sole question is as to the manner in which the possession has been obtained by the defendant. If it turns out to have been obtained, as in this case, in any of the several ways prohibited by the statute, it must be restored to the person from whom it has been

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taken in such improper manner." But does the statute prohibit a public officer, in the enforcement of a law, or city ordinance, from taking possession of property, where this is necessary to prevent a violation of the law? Under such circumstances, can it be said with even a semblance of propriety, that he has taken possession under some pretended claim and without lawful warrant or authority? This question has been answered by a decision of this court. In Raiford vs. Hyde, 36 Ga., 93, 94, Harris, J., says: "Upon examining carefully the act of 1821. we cannot think that the legislature even contemplated that sheriffs and constables should be made, as such, in the discharge of their ministerial duties, amenable to this summary proceeding. To sanction it would be to sacrifice the interests of the public, as the inconvenience which would arise from sustaining the right claimed would be incalcu-Public policy demands of us an interpretation which will avoid it." The constant interference by subordinate magistrates with the execution of municipal ordinances, would so cripple and impede the operations of these governments as to render them powerless to perform the functions with which, for wise and salutary purposes, the legislature has invested them; and thus believing, we shall offer no incentives to any one to meddle with the exercise of their powers. If they exceed the limits to which they are confined, and act beyond or contrary to their duties as prescribed by their charters, the superior courts will be found ready, in the exercise of their unquestioned jurisdiction, to restrain them, or to award damages for the wrong.

By the common law, cattle wandering about damage feasant might be taken up and impounded, and if the rights of this party have been violated by interrupting the pranks and gambols of this sportive filly, she has her remedy, not only against this marshal, but against the municipality under whose orders he acts; but her remedy a not that which, as we have seen, has been selected in the

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present instance. It is difficult to understand how property in custody by authority of law; state or municipal, can be held only under a pretended claim, and without warrant or authority. This remedy is summary, in derogation of common right and common law, the statute giving it is to be strictly construed and literally pursued, and unless the case falls clearly within its words, it is not applicable.

Judgment reversed.

## GRESHAM vs. Johnson et al.

[This case was argued at the last term, and the decision reserved.]

- 1. The setting apart of a homestead or the allowance of an exemption, under §2040 of the Code, does not alter or change the title to/property exempted; it merely sets apart such property for a particular specified use, and to that extent imposes a charge or encumbrance upon the estate. When, however, the family is broken up, either by the death of the dependent members, or by the sons' reaching their majority (in case they are otherwise sui juris), the property becomes disencumbered, and is liable for the debts of the owner of the legal title. The use is then fully executed, and is at an end.
- (a.) If females are members of a family for whose benefit the homestead is set apart, the property remains exempt from levy and sale so long as one of them lives and remains single.

February 13, 1893.

Homestead. Title. Before Judge Pottle. Oglethorpe Superior Court. April Term, 1882.

Reported in the decision.

JOHN C. REED; HAMILTON McWhorter, for plaintiff in error.

SAMUEL LUMPKIN, for defendants.

HALL, Justice.

An execution, issuing from a judgment against B. A.

Gresham vs. Johnson et al.

Gresham, as principal, and against Johnson et al., as his securities, was paid off by the securities, and levied, for their reimbursement, upon the land in question. land had been exempted prior to this levy, for the benefit of the said Gresham and his then minor son, under section 2040 of the Code of 1873. When this exemption was made, the family of the applicant consisted only of himself and one minor son, then under the age of sixteen At the date of the levy, the applicant and defendant in the execution, B. A. Gresham, was dead, and the minor son, William P. Gresham, had attained his majority. He interposed a claim to the property, contending that the title, by virtue of the exemption, vested in him. On this state of facts, the case was submitted to the presiding judge without the intervention of a jury, for decision. After argument and consideration, the property was found subject to the execution, and the levy was ordered to proceed. Exception was taken to this judgment, and the only question made for our consideration is, whether the exemption under this section of the Code vested the title in the claimant, it being admitted that the family was broken up by the death of its head, and by the son, the only other member, attaining his majority.

1. Our view of this case is that the setting apart of a homestead, or the allowance of an exemption, does not alter or change, or in any manner affect the title to the property exempted; it simply sets it apart to a particular, specified use, and to that extent imposes a charge, or incumbrance upon the estate; and when the family is broken up, either by the death of its dependent members, or by the sons' reaching their majority, in case they are otherwise sui juris, the property becomes disencumbered, and is liable to the debts of the owner of the legal title; the use is then fully executed and is at an end. 59 Ga., 330; 61 Ga., 154. We do not mean to hold that, if females composed a part of the family, they would be deprived of the benefits of the homestead, whether they had at

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tained their majority or not, or that it is at all indispensable that they should be the daughters of the head of the household; in their case, nothing more is required than that they were of the family for whose benefit the exemption was made; the charge continues and the property is exempt from levy and sale, so long as one of them lives and remains single.

This, we think, is the result of the decisions heretofore made by this court upon this subject; they have never gone further, and we shall not extend them so far as to divest the title of the owner and vest it in the beneficiaries. The law does not do this in terms, and we cannot, by a loose interpretation, give it such an effect. See upon this subject the case of Hall vs. Mathews et al., determined at February term, 1882, of this court, and not yet published, and the cases there cited.\* Wherever the title to the homestead is referred to as belonging to the beneficiaries, in any of the foregoing decisions, or in any of the cases which they cite, it will be evident that the word is not used in its literal and legal, but in a qualified or loose, sense as synonymous with interest.

Judgment affirmed.

# HEATH et al., administrators, vs. BATES.

- 1. The pendency of a former suit for the same cause of action between the same parties, in the same or any other court of competent jurisdiction, is (with certain specified exceptions) a good cause of abatement, unless the first action is so defective that no recovery can possibly be had. As to actions simultaneously commenced and prosecuted, a suitor is put to his election.
- 2. While a scire facias to make parties in some of its features is in the nature of a suit, it is more properly a continuation of the old case than the inception of a new one, and it is not such a suit or action, within the meaning of the Code, as will abate under a plea setting out the pendency of another scire facias between the parties and for the same purpose.

April 8, 1883.

<sup>\*68</sup> Ga , 490,

Heath et al., administrators, ve. Bates.

Scire facias. Lis pendens. Abatement. Actions. Before Judge FAIN. Bartow Superior Court. July Term. 1882.

Bates brought ejectment against Vaughan. Pending the action the defendant died, and, after the expiration of twelve months, plaintiff proceeded by scire facias to make his administrators parties. They pleaded that a former scire facias had been sued out by the plaintiff, and was pending at the time this proceeding was begun, and therefore the second proceeding should abate. On the hearing, counsel for movant moved to strike the plea, and stated that the former proceeding had been dismissed since the issuing of the second scire facias. Counsel for respondent admitted this under protest, insisting that it could not be considered on a motion to strike the plea. The court struck the plea, and passed an order making the respondents parties; whereupon they excepted.

AKIN & AKIN, for plaintiffs in error.

J. M. NEEL, for defendant.

HALL, Justice.

To a scire facias to make parties, can the pendency of another sci. fa. between the same parties and for the same purpose be pleaded in abatement? The pendency of a former suit for the same cause of action, between the same parties, in the same or any other court that has jurisdiction, is a good cause of abatement; but if the first action is so defective that no recovery can be possibly had, the pendency of a former suit will not abate the action. Code, §3476. See in connection Ib., §2894, in which a suitor is put to his election where two actions are commenced and presecuted simultaneously for the same cause; but if commenced at different times, the pendency of the former is a good defence to the latter. These rules are applicable also

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to torts (Ib., §3063), and the only exceptions which the Code makes to them is in cases of attachments pendente lite, (Ib., §§2895, 3280), and in cases by informers, wherein the first filed in office for the same cause of action has precedence, and the latter abates. Ib., §2896. See also Ib., §1948, which provides that a creditor cannot pursue the person and property of his debtor at the same time, except in cases specially provided for, and if he does so the process last sued out shall be void; and by the common law, suits may proceed simultaneously upon a mortgage and the debt it is given to secure, and the pendency of one will not affect a suit brought thereafter upon the other.

Is a scire facias to make parties a "suit" or "action" in which there can be a recovery? If it is not, the pendency of a former cannot be set up as a defence to the latter. There is nothing in our Code that countenances such an idea. §§3429 to 3436 inclusive. Indeed, in case of suits to revive dormant judgments, option is given to proceed either by action of debt or scire facias (Code, \$3604); if the action of debt be adopted, it must be brought in the county where the defendant resides at the commencement of the action (Ib., §3605); but the scire facias is brought in the county, and returnable to the court in which the judgment that has become dormant was rendered (1b. §3607), because it is expressly declared not to be " an original action, but a continuation of the suit in which the judgment was obtained." Ib., §3606. It is apparent that this is strictly true of a scire facias to make parties, the very purpose of which is to continue the suit in which it issued and to prevent it from abating by the death of any or all the parties. And these provisions are in accord with the principles of the common law; they are taken from the decisions of our courts and incorporated into the Code; none of these adjudications declare the scire facias a "suit," or "action." Judge Lumpkin delivering the opinion of the court in 1 Kelly, 293, quoting from Coke, says that the scire facias is accounted in law to be "in the nature of an Heath et al., administrators, vs. Bates.

action," and so Judge Bleckley, in 52 Ga., 93, describes it as being in the "nature of a suit," and that, too, it must be remembered, only to a limited extent, to enable the party to make a proper defence, which, in this particular case, would consist of anything going to show that he should not become a party to the original suit. 2 Abbott's L. Dict., verbo Scire Facias, pp. 448, 449.

"A scire facias is deemed a judicial writ, founded on some matter of record, as judgments, recognizances, and letters patent, on which it lies to enforce the execution of them, or to vacate or set them aside. And though it be a judicial writ, or writ of execution, yet it is so far in the nature of an original action, that the defendant may plead to it, and it is in that respect considered as an action." 8 Bacon's Ab., Sci. Fa. (A). But for some purposes it is considered only as a continuation of the original action. As where interlocutory judgment was obtained against his testator before his death, and pending the action his attornev agreed that no writ of error should be brought; on testator's death a scire facias being brought on the judgment against his executors, the court held that they could not bring the writ of error; because, as Ashurst, J., delivering the opinion, said, "this is not a new action, but s continuation of the old one; it is only a scire facias to revive the former judgment. And as the testator himself. if he had lived could not have brought a writ of error, in consequence of the agreement, neither can his executors." Ex'rs of Wright vs. Nutt, 1 T. R., 388. "One that is no party to the record, recognizance, fine or judgment, as the heir, executor, or administrator, though they be privy and it be within the year, shall have no writ of execution, but a scire facias to enable themselves to the suit." 8 Bac. Ab., Sci. Fa., C. (4). In Bouvier's Law Dict., verbo Action. we find the distinction clearly marked out between in action in its legal sense and a suit of sci. fa. "Actions." he says, "are to be distinguished from those proceedings such as a writ of error, scire facias, mandamus, and the

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Georgia Ice Company vs. Porter & Meakin.

like, where, under the form of proceedings, the count the plaintiff, appears to be the actor," citing 6 Bix R., 9.

A scire facias not being a suit or action, it follows that the pendency of a former suit cannot be pleaded in abatement to it, and hence the defence was properly disallowed by the court below. This disposes of the case, and renders the consideration of the other questions made by the record and insisted upon at the hearing, unnecessary.

Judgment affirmed.

## GEORGIA ICE COMPANY vs. PORTER & MEAKIN.

[This case was brought forward from the last term, under \$4271 (a) et seg. of the Code.]

- 1. That a notary public was an employé of a bank in which a member of a firm desiring an attachment was also an employé and stockholder, did not create such a relation between the two as made it improper for the notary to issue the attachment or rendered the writ so issued void.
- There was no error in charging the jury that the North American Ice Company was concluded by a judgment, regularly rendered upon an attachment sued out against them, and levied on their property.
- 3. Where parties commenced and carried on business as a corporation de facto, and held themselves out to the world as such, and in that name and character obtained credit, they were estopped from denying such character and name, especially after judgment had been rendered against them.
- (a.) A perfect equity is subject to levy and sale, although the naked legal title may be in a third person.
- (b.) The conversion of a trading company acting as a corporation de facto into one de jure, will not exempt the property held in the latter character from liability to the obligations of the former. February 20, 1883.

Attachments. Officers. Nullities. Judgments. Corporations. Levy and Sale. Before Judge HILLYER. Fulton Superior Court. April Term, 1882.

On June 23, 1879, an attachment was sued out by Porter

& Meakin against the North American Ice Company, and was levied on certain real estate. No defence was made, and a judgment in attachment was rendered for the plaintiff April 1, 1880. A claim was interposed to the levy thereunder by the Georgia Ice Company.

When the claim case was called for trial, claimant's counsel moved to quash the execution and attachment proceedings, on the ground that the affidavit was made by J. H. Porter, on behalf of his firm, before C. D. Woodson, N. P., and the attachment was issued by the latter. In support of this motion, it was shown that Porter was cashier of the Merchant's Bank, and owned stock therein, and that Woodson was a clerk in the same bank. The court overruled the motion.

The evidence on behalf of the plaintiffs was, in brief, as follows: The land on which the ice factory is located, and which is now in controversy, was purchased in 1875. one Brown negotiating the purchase and taking the deeds in the name of one Coughlin. On December 20, 1879. after the levy of the attachment, Coughlin made a deed to the property to the Georgia Ice Company, the expressed consideration being \$1.00. The property was returned for taxation in 1878 and 1879, and assessed as belonging to the North American Ice Company. Coughlin made no return for those years. The goods, for the purchase money of which suit was brought, were delivered on the order of one Becker, who was in charge of the factory at the time, and represented himself as being the agent of the North American Ice Company; and the goods were so charged. The work which formed the subject-matter of some of the charges was done at the factory. The North American Ice Company had a sign over the door, and there was a safe in the office with their name on it. The plaintiffs had previously sold and charged goods in the same way, and the bills had been paid.

The evidence on behalf of the defendant was, in briefas follows: One Beath had certain patents for making ice;

and for the purpose of putting them into practical operation, he formed a partnership with Coughlin and John P. They were to furnish the necessary money, and own four-fifths interest in the patents throughout the Coughlin furnished the money to buy the United States. ground and erect this factory. The title was taken in his name, but it was really for the benefit of the partnership. About a year after this, when the factory was nearly completed, a question arose as to the proper manner of holding the patents, it being suggested that, if they were held by the partnership, any one of the partners might use them for his own private benefit. For the sole purpose of holding these patents, the North American Ice Company was then incorporated, and the title to the patents was conveyed to it. In the early part of the year 1879, the company conveyed away its patents, and Beath's connection In 1878, when the bill sued on was conwith it ceased. tracted, Becker occupied the ice factory, stating that he did so by permission of John P. Jones. He was making experiments in regard to making ice on his own account, and the premises were closed except while he was there. He employed his own workmen and paid them himself. The bill of Porter & Meakin was made while he was there. At the time of the trial, Beath was the manager of and a stockholder in the Georgia Ice Company. He swore that no part of the property levied on ever belonged to the North American Ice Company, and that none of its money was used in the purchase of the land or the erection of the building.

The jury found the property subject. Claimant moved for a new trial on the following grounds:

- (1.) Because the court refused to quash the attachment proceedings.
- (2.) Because the court erred in charging the jury as follows: "The general principle of law is that no person is bound by a judgment, unless he has had his day in court. If he is served with the process, he is bound. This prin-

- ciple, however, applies where a levy is made under an attachment. If the attachment was sued out against the North American Ice Company and levied, and proper proceedings had, and a verdict and judgment rendered in the case, this would be conclusive as to the liability of the North American Ice Company."
- (3.) Because the court erred in charging the jury as follows: "If the North American Ice Company had the equitable ownership of the property at the time of the levy of the attachment it would be subject. If, when Brown took the deed to Coughlin, he took it for the benefit of the persons who were afterwards incorporated for the purpose of carrying out the same objects that these persons were associated together for, the equitable title would be in the defendant, even though the charter was not obtained until afterwards, and it would be your duty to find the property subject; but if he took the deed at the time for other and different parties, it would be otherwise." this being, in substance, the entire charge of the court on that branch of the case.
- (4.) Because the verdict of the jury was contrary to law and evidence.

The motion was overruled, and claimant excepted.

Cox & Hammond, by brief, for plaintiff in error.

B. F. Abbott, for defendants.

HALL, Justice.

1. The notary public issuing this attachment bore no such relation to either of the plaintiffs as would make it improper for him to act, and as would render the writ void: he was not connected in business with Porter in such manner as to disqualify him from acting as a notary, from taking the affidavit and bond and signing the writ in a case in which Porter and his partners were parties. The most that can be said is that Porter and the notary were

co-employés in a bank in which Porter was likewise a stock-holder. None of the cases cited for the plaintiff in error have gone this length, though they have gone quite far enough. 50 Ga., 425, 435, is a complete answer to the position here taken.

- 2. Nor was there any error in charging the jury that the North American Ice Company was concluded by a judgment regularly rendered upon an attachment sued out against them and levied upon their property.
- 3. Where parties commenced and carried on business as a corporation de facto, and held themselves out to the world as such, and in that name and character obtained credit, though the same persons afterwards obtained a charter under another name, and thereby became a corporation de jure, continuing all the time to use in the last named corporation the property on which they carried on business, and obtained credit under their first name, and when they took titles to the property in question in the name of one of their associates in the enterprise, for the use of himself and all the others who paid the purchase money therefor, it was not error to charge the jury in a claim case, "that if the company had the equitable ownership of the property at the time of the levy of the attachment, it would be subject; that if the deed was taken for the benefit of the persons who were afterwards incorporated for the purpose of carrying out the same objects that these persons were associated together for, the equitable title would be in defendant, even though the charter was not obtained until afterward, it would be their duty to find the property subject, but if he took the deed at the time for other and different parties, it would be otherwise."

The verdict finding the property subject, under this charge, which fairly submitted the issue, was sustained by the evidence in the case, and being so sustained, was not only authorized but required by well settled principles of law. The defendants were estopped from denying the

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character and name under which they traded and obtained the credit, especially after judgment had been rendered against them covering the transaction. Code, §§3577, 3826, 3753. That a perfect equity is subject to levy and sale, although the naked legal title may be in a third person, is so clear, that a citation of authorities to sustain it would be needless. The conversion of a trading company acting as a corporation de facto, into one de jure, will not exempt the property held in the latter character from liability for the obligations of the former. Morawetz on Corp., §143, and cases cited in note there; Ib., 134.

Judgment affirmed.

## BECKWITH, trustee. vs. McBride & Company.

[Jackson, Chief Justice, being disqualified, did not preside in this case.]

- By the Code, \$3377, trust estates are made liable to suits in courts of law to collect and enforce the payment of claims against them for services rendered, or for property or money furnished for their use, to the same extent as they would be rendered liable in courts of equity.
- 2. That the trust property described in the declaration consisted of realty, did not make the action such a suit respecting the title to land as could only be brought in the superior court.
- 3. Where certain members of the vestry of a church, the title to the property of which was in a trustee, caused gas fixtures to be placed in the church building, but it was not shown that the trustee, either personally or through his authorized agents, ever ordered or received the goods, or that the congregation or parish did so, or that they were furnished for the use of the trust estate, which consisted entirely of the church lot, a verdict against the trustee was not supported by the evidence.
- (a.) Nothing is decided as to the ability of the trustee in such a case to put a charge upon the trust property, that question not being made by the record.

May 1, 1888.

Trusts. Equity. Jurisdiction. Actions. Constitutional Law. Religious Corporations. New Trial. Before Judge CLARK. City Court of Atlanta. June Term, 1882.

Beckwith, trustee, vs. McBride & Company.

Reported in the decision.

HARRISON & PEEPLES; BECKWITH & BRADFORD, for plaintiff in error.

CANDLER & THOMSON, for defendants.

HALL, Justice.

This was a suit at law brought to charge certain real estate in the city of Atlanta, held by the defendant in trust "for the use of the congregation and parish of St. Luke's Church," with the price of certain gas fixtures and other articles, which the plaintiffs, by their amended declaration, alleged "were furnished by the authority of the defendant, and were placed on the premises of the trust estate, and for its use, they being necessary to said trust estate, in that they afforded means of furnishing light, which was essential to the religious services, for which the estate was created."

These essential allegations were denied by the defendant, and the cause being called for trial upon the issues thus formed, the defendant, by his counsel, demurred to the declaration, and for cause of demurrer, assigned,

- (1.) Because the declaration sets forth an equitable cause of action, of which the superior court of Fulton county has exclusive jurisdiction.
- (2.) Because, by this proceeding, the plaintiffs seek to subject a trust estate to the payment of the claim sued upon, which is an equitable remedy this court is not authorized to administer.
- (3.) Because the plaintiffs aver in their declaration that the title to a certain tract of land therein described, is in the defendant, which averment is essential to the plaintiff's action, and involves the title to the said tract of land, thereby ousting the jurisdiction of this court.

This demurrer was overruled by the court, and the defendant filed his exceptions thereto, pendente lite. Upon

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the trial of the main issues, the jury found a verdict for the plaintiffs, and a motion was made for a new trial, upon various grounds, none of which, in the view we take of the case, are material, except the following:

Because the verdict is contrary to law, is decidedly and strongly against the weight of evidence, and without evidence to support it.

The motion was overruled, and a new trial refused, unless the plaintiffs would write off a portion of the verdict, which they did. To this judgment, overruling said motion and refusing a new trial, exception was taken, and the case was brought to this court.

- 1. The demurrer, which raised objections to the jurisdiction of a court of law over claims sought to be charged upon trust property, was properly overruled. By the Code, \$3377, trust estates are made liable to suits in courts of law to "collect and enforce the payment of claims against them for services rendered them, or for property or money furnished for their use, to the same extent as they would be rendered liable in courts of equity." See cases cited under this section in Code of 1882.
- 2. Neither do we think the objection to the jurisdiction of the city court, upon the ground that the suit involved the title to land, was maintainable. This was certainly not a suit respecting the title to lands, in the sense attached to those words by the constitution and laws, any more than would be any other suit which might eventuate in fixing a lien upon land. 34 Ga., 53; Ib., 510; 37 Ib., 346; Powell vs. Cheshire, February term, 1883, not yet reported\*; Penn vs. Lord Baltimore, 2 White & Tudor's Leading Cases and notes, part 2, pp. 308 et seq.
- 3. This verdict should have been set aside, because there was no evidence to support it. There was nothing in this record to show that the trustee, either personally or through his authorized agents, ever ordered or received these goods in question, or that the congregation or parish of St. Luke's did so, or that they were furnished for the use of the trust

<sup>\*</sup> See ante p. 857.

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estate, which consisted entirely of the lot in question. It is shown, however, that certain members of the vestry of St. Luke's parish made the purchase and had the gas fittings put in the church edifice placed upon the land held in trust, and that they supposed they had authority as a vestry to do so; but these members of the vestry did not constitute that entire body. There was no authority shown from the vestry, as a body, to make this purchase and bind the property held in trust for the use of the congregation and parish; and even if this had been done, it does not appear that the vestry was the agent authorized to act, either for the trustee or congregation or parish. If they had such authority, it should have been shown. The failure to show it authorizes the presumption that it did not exist. It is a well settled rule that what does not appear does not exist. So far as authority from the defendant was concerned, it is shown by the plaintiffs' own testimony that they had "no authority from the trustee;" that "the trustee refused to have anything to do with them." Be sides, the defendant's evidence shows that the plaintiffs agreed to look to the individual members of the vestry with whom the contract was made, for their money, and, so far as we can see, this testimony is uncontradicted. The very object in creating this trust was to remove the property from the power and control of the congregation and parish and place it elsewhere. From its very nature, this charitable provision must have a trustee to look after and administer it. This is unlike an ordinary trust; it is perpetual, and the estate conveyed cannot exist without Such a manager of charitable donations is not and cannot, from the very nature of things, be a mere dry trustee, charged only with the duty of protecting the title to the property.

These questions were thoroughly examined by this court, and the relations of the trustee and the cestuis que trust, and their respective powers over the property, accurately defined in the case of Beckwith, trustee, vs. The Rector,

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etc., of St. Philips Church, determined September term, 1882, and not yet published.\*

We decide nothing as to the ability of the trustee, in such a case as the present, to put a charge upon the trust property, because the record does not necessarily make the question; or as to the liability he would incur by such an attempt. If, however, there was nothing peculiar in this class of trusts, and they stood upon the footing of other trusts, there is not enough in this case to subject them to such claims as that set up by the plaintiffs. It is only necessary to cite a few of the many cases furnished by our own reports, to establish this position.

As to the necessity of showing authority from the trustee. 41 Ga., 598; and as to the other requisites to charge trust property, and the extent to which it may be incumbered. 28 Ib., 225; 48 Ib., 365; 53 Ib., 226; 60 Ib., 152. The industry and ability of plaintiff's counsel did not enable him to produce a single case controverting these principles.

It is not necessary to consider a question, made and insisted upon by the counsel for the trustee, before this count that the subject-matter of this claim, as appears from the record, is res adjudicata; indeed, it would, as we conceive be improper to do so. as no such defence was made or passed upon by the lower court.

Judgment reversed.

# LEWIS 22. WALL.

 When a party institutes a suit, it is his duty to attend to its progress, and take notice of any defence that may be filed. It is not incumbent upon the court to keep him informed of the various steps taken in its course, and he is not entitled to service of the pleas. though a plea of set-off may be filed.

(a.) A set-off being pleaded, the court should not, of its own motion. have dismissed the suit, or continued it in order to give the plaintiff notice of the defence.

Mere general statements in an affidavit of illegality, that the pleadings were so defective that no legal judgment could be rendered.
 will be disregarded.

<sup>\*69</sup> Ga., 564.

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- 3. In order for the allegation that a judgment was obtained by perjury to be available as a ground of an affidavit of illegality, it should appear that the offender has been convicted, and that the judgment could not have been obtained without his evidence.
- 4. It is no ground for an affidavit of illegality that a fi. fa. from a justice's court was levied by a constable outside of the district where the judgment was entered, and outside of the county of defendant's residence, when it appears that the property levied on was found in the bailiwick of the officer making the levy; nor was it necessary that the fi. fa. should have been backed by a magistrate of the county of the defendant's residence, to authorize the levy made in this case.
- 5. A town marshal may be a bailiff. There is nothing incompatible or inconsistent in the exercise of the powers and duties of both offices by the same person.

April 8, 1898.

Set-off. Actions. Notice. Justice Courts. Illegality. Judgments. Levy and Sale. Constable. Officers. Before Judge Stewart. Henry Superior Court. October Term, 1881.

Reported in the decision.

J. T. Spence, by Harrison & Peeples, for plaintiff in error.

THOMAS W. THURMAN, for defendant.

HALL, Justice.

The affiant brought suit against the plaintiff in execution, in a justice's court in Henry county, to which the said plaintiff in this fi. fa. pleaded a set-off, and had judgment upon his plea for sixty-three 86-100 dollars. Upon this judgment, an execution issued, and was levied upon the property of the defendant therein. Upon the levy being made, the defendant filed an affidavit of illegality thereto, upon the ground,

(1.) That the court rendering the judgment had no jurisdiction of the person of said defendant, who was the plain-

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tiff in the suit to which set-off was pleaded, because he was not, at the time of rendering the judgment, a resident of the county and district wherein the suit was brought, but of another district and county.

- (2.) Because he was not present at the trial, had no notice of the plea, and had not been served with the same; and that, when he did not appear, the justice should have dismissed the suit for his failure to appear and prosecute it; and failing to dismiss it for these reasons, the court should have deferred or continued the case, and given him notice of the pending defence.
- (3.) Because the pleadings were so defective that no legal judgment could have been had or rendered thereon.
- (4.) Because the judgment on which the fs. fa. issued had been obtained by the perjury of the plaintiff therein; that he had been indicted for the offence in Henry superior court, where the indictment was then pending and undisposed of.
- (5.) Because the fi. fa. was levied by the constable of another district than that in which the judgment was obtained, when there was, at the time of the levy, a constable in said first named militia district, i. e., the district in which the court rendering the judgment was held; that the defendant was, at the time of the levy, a resident of Fayette county, and the fi. fa. should have been levied by an officer of that county; and that it should have been backed by a magistrate of the county of defendant's residence.
- (6.) Because the constable making the levy was not a lawful officer, forasmuch as he was, at that time, marshal of the town of Hampton, and that the two offices are inconsistent.

This case coming on to be heard upon an appeal to the superior court of Henry county, the affidavit of illegality was, upon motion, dismissed, and this ruling is assigned for error here.

1. When a party institutes a suit, it is his duty to attend to its progress, and take notice of any defence that may be

#### Lewis ra Wali

- filed. It is not incumbent upon the court to keep him informed of the various steps taken in its course, and he is not entitled to service of the pleas. A set-off being pleaded, the court should not, of its own motion, have dismissed the suit, or continued it in order to give the plaintiff notice of the defence; the plaintiff himself could not dismiss his action so as to interfere with the plea, unless by leave of the court, on sufficient cause shown, and on terms prescribed by the court. Code, §2709.
- 2. The affidavit of illegality does not specify, nor does the record show. wherein the pleadings were so defective that no legal judgment could be rendered in favor of the party pleading the set-off. That general statements of this character should be disregarded by the court, is too well settled by repeated decisions to require further comment.
- 3. There was nothing in the ground alleging that the judgment was obtained by perjury, and that the perjurer had been indicted. To make this ground available, there should have been a conviction of the offender, and it should appear that the judgment could not have been obtained without his evidence. Code, §3591; 25 Ga., 671; 30 Ib., 300.
- 4. There is nothing in the ground that the levy was made by a constable outside of the district that rendered the judgment, and outside of the county of the defendant's residence, when it was apparent that the property levied upon was found in the bailiwick of the officer making the levy: nor was it necessary that the  $\hat{p}$ . fa. should have been backed by a magistrate of the county of the defendant's residence, to authorize the levy made in this case. Code, §4167.
- 5. A town marshal may be a bailiff. There is nothing incompatible or inconsistent in the same person exercising the powers and duties of both offices. Constables are prohibited from being sheriffs or sheriffs' deputies; nor can they be clerks of superior courts; nor can those officers be constables. Code, §470.

Judgment affirmed.

Richards vs. Jernigan et al , executors.

# RICHARDS vs. JERNIGAN et al., executors.

Under the constitution of 1868, and Code, §2016 (a), money cannot be finally set apart as an exemption by the ordinary, until it has been invested. An exemption of money is void as against a debt prior to 1877.

(a.) Therefore, where money had been brought into court under garnishment, based on a debt created in 1872, and the debtor claimed it, and, by equitable plea, stated that he was the head of a family consisting of himself and wife; that he desired to invest the money in a horse to be held by him as a part of the exemption allowed him under the law; that the fund was impounded at the time he applied for his exemption, and he could not, therefore, make an investment, and prayed that the verdict and judgment be so moulded as to secure to him the making of the investment—such equitable plea was properly stricken on demurrer.

April 17, 1833.

Garnishment. Homestead. Before Judge Lawson. Greene Superior Court. September Term, 1882.

Reported in the decision.

JOHN C. REED; L. E. BLECKLEY, for plaintiff in error.

H. T. & H. G. LEWIS; W. H. BRANCH, by brief, for defendants.

HALL, Justice.

The defendants in error were judgment creditors of the plaintiff in error, and caused a garnishment to issue against one of his debtors, who answered that he had in his hands one hundred dollars belonging to the plaintiff in error, but since said amount came to his hands he had been notified by the said plaintiff that the same had been set aside as an exemption to his family under the homestead laws of this state.

This sum was impounded in the court, and the plaintiff in error filed an equitable claim thereto, wherein he set forth that he was the head of a family consisting of him-

#### Landis vs. The State of Georgia.

self and wife; that he desired to invest the amount impounded in a horse, to be held as a part of the exemption allowed him under the law; that the fund was impounded at the time he applied for his exemption, and for that reason he was prevented from "making the investment;" that the same is needed for the support of his family. He prayed that the court of law would do what it would be incumbent upon a court of equity to do under the circumstances, and that he should have a verdict and judgment so moulded as to secure to him the making of the investment asked.

To this claim a demurrer was filed by the plaintiffs in the judgment, and the demurrer being sustained and the claim dismissed, judgment was awarded them against the garnishee. This ruling of the court below is excepted to, and upon this exception the judgment of this court is invoked. It appears from the record that the debt upon which this garnishment issued was contracted on the 5th of December, 1872. We must infer from what appears that the exemption was sought under the homestead allowed by the constitution of 1868, and the laws enacted in pursuance of the same; this being the case the question is not an open one here. Johnson vs. Dobbs, 69 Ga., 605, determines it against the claim of the plaintiff in error.

Judgment affirmed.

# LANDIS vs. THE STATE OF GEORGIA.

[This case was brought forward from the last term, under §4271(a) d seq. of the Code.]

Ordinarily the defendant in a criminal case is entitled to have the entire case left to the jury, upon the evidence introduced by both sides, and if, upon a consideration of all the evidence, every reasonable doubt be not removed, he should be acquitted. If the defendant submits proof insufficient to establish an alibi, as such, still the proof submitted may be considered by the jury in connection with the other evidence, in deciding whether a reasonable

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doubt as to the guilt of the accused has been raised. It was, therefore, error to charge that, if the evidence was sufficient to warrant a conviction, irrespective of the question of alibi, and if the defendant sought to set up an alibi, the evidence to support such defence should be so strong as to convince the jurors' minds beyond a reasonable doubt of the truth of the alibi.

February 20, 1883.

Criminal Law. Alibi. Before Judge CLARK. City Court of Atlanta. March Term, 1882.

Landis was tried in the city court of Atlanta on an accusation charging him with malicious mischief. One ground of his defence rested upon an *alibi*. He was found guilty, moved for a new trial, which was refused, and he excepted. For the other facts, see the decision.

JOHN D. CUNNINGHAM; HENRY H. TUCKER, JR., for plaintiff in error.

W. D. Ellis, solicitor of city court, for the state.

HALL, Justice.

The only assignment of error made by this record that we deem it necessary to notice, is that made upon the judge's charge on the effect of the evidence had in the case upon the subject of the defendant's proof of an alibi-

The able and experienced judge who tried the case charged the jury that, "if the evidence, irrespective of the alibi, convinced their minds, beyond a reasonable doubt of the commission of the offence set forth in the accusation, and of the identity of the defendant as the person who committed it, and if they believed from the evidence that the defendant was guilty, under the law as given them in charge, and would so find him if there was no evidence of the alibi, then that evidence should be so strong as to convince their minds, beyond a reasonable doubt, of the truth of the alibi; that, to acquit on the ground of alibi

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the evidence of that fact should have the same degree of certainty as is required to convict on the part of the state; it should, on such a defence, outweigh the evidence of the state, and show that the commission of the offence by the defendant at the time it was alleged to have been committed, if committed at all, was an impossibility."

The jury was recalled, at the request of defendant's counsel, as they were leaving the court-room, and in response to a question propounded by them to the court, if it was intended that the jury were to understand, "that the facts going to establish the alibi relied upon by the defendant must be proved beyond a reasonable doubt, before it could be available as a defence." The judge, addressing himself to the jury, replied: "Yes, the facts to sustain the alibi must be proved beyond a reasonable doubt," that is to say, "with the same degree of certainty that the state is required to make out its case."

It is due to our learned brother, who delivered this charge, that the reasons which led him to the conclusion he reached should be set forth in his own language. says, in a note at the close of the writ of error, that he 'was surprised to learn, from his own investigation and that of counsel on both sides, how little law there is in the books, especially the old books, on the subject of alibi. Hence, he came to the conclusion that the rule should vary according to the evidence on both sides, and that which was laid down should be the one that ought to prevail in this case, which presented a good opportunity to obtain from the Supreme Court a definite ruling as to the effect of an alibi when, but for it, the jury would have to believe defendant guilty beyond a reasonable doubt, and in some cases beyond any doubt; that an alibi is the common resort of defendants in desperate cases, is the most usual mode of manufactured defences, and therefore, in his judgment, public justice, in cases where the defendant's guilt, but for the alibi, is certain, requires a stringent rule: for, if injustice should be done by a jury to the deLandis vs. The State of Georgia.

fendant, he would generally be safe in the hands of the court, on a motion for a new trial, and guilty men should not be allowed to escape in the mere smoke of an alibi. even though it is a dense smoke, it is smoke at last, however dense.'

Whether these considerations would be entitled to weight, if addressed to the law-making power, we do not propose to determine; for what authority has this or any other court to make law? It is our province to interpret the law. "Judex est custos, non conditor, juris; judicia exercere potuit, facere leges non potest," is the terse, brief and comprehensive summary of the civil law, as to the powers and prerogatives of a judge incorporated in our law, and fortified by that provision of the state constitution which keeps separate the departments of the government, and inhibits either one of them from doing acts or exercising powers pertaining to either of the others, unless expressly authorized so to do. When, therefore, a judge goes beyond this, he transcends the limits to which he is confined, and usurps the powers of the legislator.

Rules are uniform and certain; but if they are to vary and fluctuate with every change and degree of change in the ever shifting circumstances of each case as it arises. they lose their certainty and uniformity, and cease to be In trials for crimes, these rules are to be strictly construed as against the state, in favor of the life and lib-The law presumes every man innoerty of the citizen. cent until his guilt is established by competent and sufficient testimony. While the attainment of moral and reasonable certainty is all that can be expected in legal investigations, and in civil cases a preponderance of testimony is deemed sufficient to produce mental conviction, yet in criminal cases, a greater strength of mental conviction is held necessary to justify a verdict of guilty. Code §3749. The doubt which the law recognizes inures to the benefit of the accused, not of the state, and whatever cars this doubt upon guilt is proper for the consideration of the jury, and should influence their finding; but here they

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are instructed that they are not at liberty to use testimony introduced to a talk in the same of the s introduced to establish an alibi, unless it is so conclusive as to exclude the stablish an alibi, unless it is so conclusive as to exclude this doubt of the fact set up in defence; that the defendent the defendant, in order to make it available, must sustain it by the it by the same amount of testimony that the state is required to show. quired to show in order to fix guilt, and that it must be of the same conditions of the same conclusive nature and tendency.

We have met with some dicta to the effect that if this fence turns defence turns out to be untrue, it amounts to a conviction.

Wills Cir F- 22 Wills Cir. Ev., 92; citing what fell from Justice Wills. Rex vs. Killer 22. Rex vs. Killan, 20 St. Tr., 1085. "But," says Mr. Wills, "it must not be "it must not be overlooked, that such is the weakness of human nature 4! human nature, there have been cases where under the alarm of menacing appearances, has fatally committed itself by the mitted itself by the simulation of facts, for the purpose of evading the force of apparent suspicion. When the facts evading the force of apparent suspicion. fence of an alibi fails, it is generally on the ground the the witnesses are disbelieved, and the story considered to a fabrication. a fabrication; and from the facility with which it may fabricated fabricated, it is commonly entertained with suis Dicion, sometimes sometimes, perhaps, unjustly so." And he cites the of Rex vs. Robinson, which, with other cases, will be for in his book in his book, on pages 113, 114, 115, which were of mistaken identity, and left it really doubt full who the next. the parties accused were the perpetrators of Upon these questions of identity and the presentations accused at the scene of the crime, there was so tradictory evidence, that Baron Bollard, who them, and who, it seems, had experience as a officer as well as a judge, said: "These contradiction one tremble at the consequences of relying on this nature, unsupported by other proof," arm mark was well warranted by the case he gave at the bar," he said, "he had prosecuted a child-stealing, tracing her by eleven witnesses, bons and other articles at various places in Lon last into a coach at Bishopsgate, whose evidence

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tradicted by a host of other witnesses, and she was acquitted; and that he afterwards prosecuted the very woman who really stole the child, and traced her by thirteen witnesses." There is scarcely a case, where this defence is relied upon, in which a question of identity is not involved.

"It must be admitted," says Sir Michael Foster in his Crown Law, 368, "that mere alibi evidence lieth under a great and general prejudice, and ought to be heard with uncommon caution; but if it appeareth to be founded in truth, it is the best negative evidence that can be offered; it is really positive evidence, which, in the nature of things, necessarily implieth a negative; and in many cases it is the only evidence that an innocent man can offer."

After treating of the effect of this and other exculpatory evidence, Mr. Wills, Cir. Ev., 172,\* comes to the conclusion that, "as inculpatory facts are infinitely diversified, exculpatory facts must admit of the same extent of variety, and that they may be of every degree of force. In all such cases of conflicting presumptions, it is the duty of the jury, with the assistance of the court, to weigh and estimate the force of each several circumstance of presumption, and to act upon what appear to be the superior probabilities of the case; and if there be not a decided preponderance of evidence to establish the guilt of the party, to take the safe and just course, by abstaining from pronouncing a verdict of guilt, where the necessary light and knowledge to justify them in so doing with the full assurance of moral certainty is unattainable."

In Briceland vs. The Commonwealth, the supreme court of Pennsylvania carefully considered this question (74 Penn. St. R. 469), and say: "Complaint is made of that portion of the charge relating to the defence of alibi, but without just ground. When a defence rest on proof of an alibi, it must cover the time when the offence is shown to have been committed, so as to preclude the possibility of the prisoner's presence

<sup>\*</sup> See side page 184.

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the place of the murder. Although the prisoner makes no admission of guilt by setting up an alibi, yet clearly the value of the defence consists in showing that he was absent from the place where the deed was done. at the very time the evidence of the commonwealth tends to fix its commission upon him; for if it be possible that he could have been at both places, the proof of the alibi is valueless. The court treated the evidence of the prisoner's being in bed at Truax's as an alibi defence. which in truth it was; and in this view, the portion of the charge complained of was correct. It is argued now that, though the prisoner's evidence of an alibi was not conclusive as to time, yet it tended to raise a doubt of his presence at the house of John Allingham. But the court said nothing to the contrary; and when charging on the alibi as a defence, said expressly that the prisoner's failure to prove it did not relieve the commonwealth from the duty of proving that he was the perpetrator of the crime. At the close of the charge, when speaking of the doubt which should avail the prisoner, the judge said: 'The prisoner's guilt must be made out by evidence sufficiently conclusive to exclude any reasonable supposition of innocence. Upon the whole case and every material part of it you are to give him the benefit of any reasonable doubt arising out of the evidence.' And again, 'allowing the prisoner the benefit of the presumption of innocence and of every rational doubt, you will give the evidence your calm, deliberate, and solemn consideration.' These were nearly the closing words of the charge, leaving the last and most vivid impression upon the minds of the jurors. The excellent judge who presided at the trial did the prisoner full iustice."

"In an indictment for crime, the defendant, ordinarily, is entitled to have the whole case left to the jury, upon the evidence on both sides, and if, upon a consideration of all such evidence, every reasonable doubt be not removed, the jury should acquit. Therefore, in a case of larceny, an

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instruction to the jury that the burden of proof to show the guilt of the prisoner is upon the state; but when the state has made out a *prima facie* case, and the prisoner attempts to set up an *alibi*, the burden of proof is shifted, and if the defence fail to establish the *alibi* to the satisfaction of the jury, they must find the prisoner guilty is erroneous."

Exceptions to this general rule exist as to malice in cases of homicide, and also generally where the defendant relies upon some distinct ground of defence not necessarily connected with the transaction on which the indictment is founded, e. q., insanity, etc. 64 N. C. R., 56. In Tennessee, the law has been laid down in substantially the same terms; there, where the charge was "that the proof necessary to establish the alibi must be as certain as that by which the state would have to establish the guilt of the accused," this was held to be erroneous, because its effect was to exclude the prisoner from the benefit of any reasonable doubt as to his guilt, arising from the proof touching the alibi, in connection with other proof in the cause; and further, that the prisoner was not bound to prove an alibi beyond a reasonable doubt. 7 Coldwell's R., 92. 80 in Mississippi, where to a charge of murder the defence was an alibi, it was held that, if the evidence in support of the alibi was sufficient to raise a reasonable doubt in the minds of the jury, the accused is entitled to an acquit-And in this case, it was seriously questioned whether there was such a thing as an affirmative defence to a criminal charge which would, at any time during the trial, shift the burden of proof from the state to the accused; and it seems if there be, the accused is entitled to an acquittal. when he has raised in the minds of the jury a reasonable doubt as to such affirmative matter. 53 Miss. R., 410

These cases might be greatly multiplied, but in addition to those already cited, the following will suffice to controvert successfully, the position taken in the charge now under review: 12 Ind., 670; 42 Ib., 373; 50 Ib., 190; 1 Nevents: 543; 5 Ib., 132.

# Lands vs. The State of Georgia.

"Evidence of an alibi," says the supreme court of Illinois (39 Ill. R., 457), "whether sufficient to render the guilt of the defendant impossible or only improbable, is proper for the jury, and he is entitled to any reasonable doubt they may entertain upon this point; and if he attempts to prove an alibi, and fails to do so, it should have no greater weight to convince them of his guilt than a failure to prove any other important item of defence, and should not, generally speaking, operate to his prejudice."

This, it strikes us, is a correct exposition of the law upon the subject, and accords with what was said, well and forcibly, by Bleckley, J., in delivering the opinion of the court in Johnson vs. The State, 59 Ga., 142, 143: "It could not have been the purpose of the court to say that the facts from which the impossibility of presence was to be inferred must be proved with any higher degree of certainty than is required to establish other like facts in a court of justice." And again: "What degree of mental conviction should be deemed adequate to give the facts a lodgment in the minds of the jury, is not treated of in the part of the charge we are considering. Doubtless that subject was properly dealt with in the general charge, under the head of reasonable doubt, or some other, which has not been brought up in the record." Ib., 144. And also with what was more directly said by Speer, J., in the case of Ware vs. The State, 67 Ga., 349: "We do not mean to sav. if the alibi is failed to be established with the certainty the law requires, that the proof submitted on this point may not be considered by the jury in connection with the other evidence, so as to raise reasonable doubts as to the guilt of And as there is no complaint that the court the accused. did not instruct the jury as to the law of reasonable doubts, we must presume this was done; and if so, then the de fendant had the full benefit of the law, and we find no error that entitles him to a new trial on this ground of error."

These two cases, ex abundanti cautela, carefully yours

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against an inference which the court foresaw might be erroneously drawn from rulings as to what points the evidence should cover in making out a complete defence, where an alibi was pleaded. While it is true that the cases did not necessarily make the question now under consideration, and these statements may be regarded as obiter dicta, still, they state the law, as we think, correctly, and as we now decide, when the point is distinctly presented, and our views are earnestly invoked.

Because a principle, just and proper in itself, and which has been deemed essential to the preservation of the rights and liberties of the citizen may be liable to abuse, and by its perversion and misapplication, and the facility with which evidence may be fabricated in its support, may enable guilty parties to escape merited punishment, under the dense smoke raised, we see no reason either for ignoring it, or making it more stringent in its application, than precedent or authority warrants. There is no sound policy in making decisions contrary to law, or beyond its scope. The law should never be strained to accomplish an object, however desirable it may be in particular instances. Such a precedent could only eventuate in wrong. Every man is entitled to his rights under the law. Such rights are never to be violated. This principle, remarks a very great judge, should be kept steadfast in every man's breast; but above all, it should find an asylum in the sanctuary of justice.

As there must be another hearing of this case, we refrain from expressing an opinion upon the other grounds of the motion for a new trial, and put our judgment only upon that which we have considered.

Judgment reversed.

McFerran, Shallcross & Company et al. rs. Davis, receiver, et al.

# McFerran, Shallcross & Company et al. vs. Davis, receiver, et al.

- A debtor may prefer one creditor to another by any legal means, and the right is unqualified, except that he shall not reserve the surplus for his own benefit or that of any other favored creditor, to the exclusion of other creditors.
- 2. A general assignment for the benefit of creditors, bona fide made by the debtor and assented to by the assignee, will be deemed a valid conveyance founded upon a valuable consideration, and good against creditors proceeding adversely to it, at least unless all the creditors for whose benefit it is made repudiate it; and where the creditors are not required to be parties to the instrument, they may take the benefit of the trust by notice to the trustee within the time named, if any, and if none, then within a reasonable time and before a distribution of the property.
- 3. The trusts arising under general assignments for the benefit of creditors are peculiarly objects of equity jurisdiction. When, therefore, the assignee resigned, and it became necessary for the benefit of those interested that there should be some one to carry out the trust, the appointment of a receiver, as successor to the assignee, was proper.
- 4. The resignation of the assignee was not a revocation of the deed of assignment. The title having passed into him, the trust should not be allowed to fail for the want of a trustee.
- (a.) After the title passed out of the debtors, judgments against them fixed no lien on the property.
- (b.) It is not held that the judgment creditors may not, by leave of the court, attack the deed or assert a claim to the fund, if they can show a legal claim to any part thereof.

March 20, 1883.

Debtor and Creditor. Equity. Assignments. Before Henry Morgan, Esq., Judge pro hac vice. Dougherty Superior Court. October Term, 1882.

Reported in the decision.

- D. A. VASON; RICHARD HOBBS; JOHN C. REED, for plain-tiffs in error.
  - D. H. Pope; G. J. Wright, for defendants.

McFerran, Shallcross & Company et al. re. l'avis, receiver, et al

CRAWFORD, Justice.

On the 22d day of December, 1880, Welch & Bacon, being unable to meet their indebtedness, by deed of assignment bargained, sold, conveyed and assigned to Nelson Tift, as assignee, his successors and assigns, all their real and personal property, assets, choses in action, rights and credits, and every article or thing of value owned by them. of whatever kind and wherever found, in full title and estate. He was to have and to hold the same with all the rights, members and appurtenances thereunto appertaining, unto him as assignee, and his successors and assigns in fee simple; in trust, nevertheless, that he, the said assignee, should convert the said assets into money, and after paying the expenses of administering the same, then to pay the debts of the said firm of Welch & Bacon as by the said deed directed. On the day of the execution of the said deed, Nelson Tift, the assignee, accepted the assignment and trust created, and agreed to execute the . same according to its terms.

Welch & Bacon, on the 17th day of January, 1881, filed their bill in chancery, setting forth that they had made the deed of assignment to the said Tift; that he had accepted and possessed himself of the assets as therein provided; that the creditors of the said firm were scattered and numerous, and if each one should be permitted to go into court with separate suits to try his rights, a large amount of the assets would be spent in expensive litigation; that there were many matters of account and settlement, involving a variety of conflicting claims, as well as many other reasons, which are also alleged, why the trust funds and assets in the hands of the said Tift should be placed in the hands of a receiver appointed by the court, who should execute the deed of assignment according to To this bill was annexed also a petition from the said assignee, showing why he should be permitted to resign the trust and turn over the assets to a successor.

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Upon this bill service was acknowledged by the attorneys at law for various creditors, as also an earnest request for the appointment of John A. Davis as receiver.

The chancellor granted the prayer of the bill and appointed the said Davis receiver, who accepted the same, took possession of the assets, and was proceeding, under the order and direction of the court, to execute the trust as provided by the deed of assignment, when the plaintiffs in error filed their petition, which is set out in full in the record, and which brings the case to this court.

They set out that they are judgment creditors of the said Welch & Bacon, having obtained the same in the 5th circuit court of the United States for the southern district of Georgia on the 1st day of May, 1883; that the real and personal property of the said Welch & Bacon is in the hands of John A. Davis, as the receiver of the court, having been placed there by an order of the court of equity in a cause pending in the said court, at the instance of the said firm, for the purpose of being administered under the deed of assignment made by said firm to Nelson Tift as assignee: that the same was so ordered under ex parte proceedings by the chancellor; that the said Tift resigned the appointment made and acepted by him, before the creditors were parties or accepted the terms of the assignment; that the said creditors, at a meeting held by them, refused to ratify what had been done, and requested the said Tift to resign his trust. and that the estate be placed in the hands of Welch & Bacon for the purpose of winding up the same, and that the preferred creditors do join in this request, and agree in writing that the deed of assignment be amended.

The petitioners further state that, if the said creditors had assented in writing to the deed of assignment, it might have created a subsisting trust in their favor, but not having done so during the time that the said Tift was the assignee under the said deed, that when he resigned the powers and trust therein created, it was no longer a trust; that the resignation was a revocation, and reinvested the title in

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Welch & Bacon to all the assets and property thus conveved; they deny the power of the chancellor to appoint a trustee for the said Welch & Bacon, under the facts set forth, and insist that the same is void for want of proper parties. Wherefore they claim that the right and title to all the said assets and property in the hands of the said Davis. as receiver, is in the said Welch & Bacon, and as such, is subject to the lien of their judgments. They pray the court to grant them the right to file their respective claims against the said fund and property in the hands of the receiver, with the right to insist upon the payment of their claims according to their legal priorities as fixed by the date of their judgments, but especially decline to come in and claim under the terms of the assignment, because they insist that it is null and void. They further pray that Welch & Bacon and the said receiver be made parties to their petition, and show cause why their claims should not be paid, or that leave be granted them to proceed by levy on the real estate of said firm, or by process of garnishment against the debtors of said firm, for the amount necessary to pay their said judgments.

The record does not show that the preferred creditors although requested so to do, ever agreed in writing or otherwise that the deed of assignment be annulled.

Upon the hearing of this petition by the chancellor, the same was refused, and that refusal is assigned as error.

That a debtor may prefer one creditor to another, is specifically authorized by §1953 of the Code, and this he may do by any legal means, and the right is unqualified, except that he shall not reserve the surplus for his own benefit or that of any other favored creditor to the exclusion of other creditors. The deed in question is not obnoxious to either of the above qualifications. It is an absolute, unconditional deed in fee simple as to the realty, and a perfect and complete conveyance of the personalty to the assignee, in trust for the purposes therein specified and set forth. When, therefore, the assignee accepted in writing

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the assignment made to him, the title to the said property therein conveyed vested in him for the benefit of the creditors who might accept under the deed, and which acceptance may be manifested by acting upon it, or receiving benefits under its provisions.

It will be noticed that there is no provision contained in the deed that it is to take effect when the creditors shall accept its terms. A general assignment, bona fide made by the debtor and assented to by the assignee, will be deemed a valid conveyance, founded upon a valuable consideration, and good against creditors proceeding adversely to it; at least, unless all the creditors for whose benefit it is made repudiate it. And where the creditors are not required to be parties to the instrument, they may take the benefit of the trust by notice to the trustee within the time named, if any; and if none, then within a reasonable time and before a distribution of the property. 2 Story's Eq. Jur., §1036 a.

In this case, it is shown by the record that the creditors have come in, and that they have received dividends under the assignment. The title, however, being in the assignee for the benefit of the creditors as aforesaid, and they, as well as the assignors, being deeply interested in the proper application of the assets, the right to seek the aid of the chancellor by proper equitable proceedings to protect them, is clear. The trusts arising under general assignments for the benefit of creditors, are, in a peculiar sense, the objects of equity jurisdiction. 2 Story's Eq. Jur., §1037. This, then, being so, the appointment of a receiver, whose duty it was, as successor to the assignee, to carry out the trust created, was but the exercise of a proper chancery power under the bill of the assignees.

By §274 of the Code, it is provided that when any fund or property may be in litigation, and the rights of either of the parties cannot be otherwise fully protected, or when there may be a fund or property having no one to manage it, a receiver may be appointed to take charge of the same. Mc erran, Shallcross & Company et al. vs. Davis, receiver, et al

And §3941 also provides that a court of equity may appoint a receiver to take possession of and hold, subject to the direction of the court, any assets charged with the payment of debts, when there is manifest danger of loss or destruction, or material injury to those interested. And the assignee having resigned, a case arose for the appointment of a receiver to take charge of the assets, and made it the duty of the chancellor, upon a proper application therefor, to make such appointment. There was no error, therefore, under the facts of this case, in the chancellors appointment of a receiver to take possession of the assets and protect them for the benefit of the beneficiaries under the deed of assignment.

But it is insisted by the plaintiffs in error that the resignation of the assignee was a revocation of the deed. We cannot so hold. Even if there had been no provision for the appointment of successors and assigns in the deed itself, a court of equity would never allow a trust to fail for the want of a trustee. Code, §3195.

The title to this property, as we have seen, was in the assignee, and could only be passed from him in some way recognized by the law. That the resignation, by operation of law, was a conveyance back of the title to Welch & Bacon, or that its legal effect worked such a result, we cannot admit. The date of the deed then fixes the time when all legal title passed out of Welch & Bacon, and the judgments of the plaintiffs in error could fasten no lien on any property the title to which had passed out of them.

To grant the prayer of the petitioners, and hold that their claims should be first paid, would be to hold that the deed was without legal force or effect upon the ground set forth, and that the title reverted to Welch & Bacon, and was subject to the lien of their judgments. And to grant leave to them to levy upon the real estate, or garnish the debtors of the said firm, would be to surrender the jurisdiction over property legally acquired and being administered under the order and direction of the court, and

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allow it to be taken into the jurisdiction of the fifth circuit court of the United States, another and distinct tribunal, and there have it administered. This of necessity would follow, because the levy, when made, could only be made by the marshal of the said court, and garnishments, if taken, could only be had upon the judgments rendered in the same court. We hold, therefore, that the court committed no error in refusing to grant the prayer of the petitioners.

Whilst we so hold, we are not to be understood as holding that these petitioners have not a perfect right to come in and attack this deed of assignment for fraud, or any other good and valid reason. Or, having obtained judgments against Welch & Bacon, to attack it, if it had been still in the assignee's hands; but the fund having gone into the receiver's hands, they have the right to come before the court on leave, and attack it there, or to come in and share in the distribution of the fund, if they can show that they are legally entitled to any part thereof. There being no error in the judgment of the court, it must be affirmed.

Judgment affirmed.

# EDWARDS et al. vs. Worley.

#### [This case was argued at the last term, and the decision reserved ]

- 1. A will, after leaving certain specific legacies and providing that testator's debts should be paid before distribution, contained the following items: "Item 1. \* \* \* My will is that, at the same time the above distribution is made, that my daughter, Sarah A. E. Edwards, have a negro woman loaned to her during her life, and then to the children of her body; said negro and what may subsequently fall to her in settlement with her mother, or final settlement at her mother's death, all to go into the hands of John Rich, trustee for Sarah A. E. Edwards.
- "Item 3. My will and desire is that my beloved wife, Sarah Rich, have the whole of the balance of my estate, both real and personal, during her natural life or widowhood, and at her death I give and bequeath the whole estate to my five children, to them and their

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heirs forever, except Sarah A. E. Edwards in trust as above described; but if my wife should marry, my will is that on her intermarriage that my property be equally divided between my wife and five children, to them and their heirs forever, except Sarah A. E. Edwards, as before excepted.

"Item 6. My will is that my son, John Rich, take charge of all the property falling to Sarah A. E. Edwards, and manage the same for the benefit of her and her children; and if he should die before she does, or before a settlement with the children, that in that case the court of ordinary appoint a successor to settle the same":

- Held, that the property devised by the third item of such will, so far as it concerned the testator's daughter, did not pass for her use for life with remainder to her children, but she and her children occupied the position of tenants in common as to one share of the property to be divided at the death of testator's wife. Such share was to be held in trust, and the children were entitled to a settlement when in law, by reason of being of full age, they could demand it.
- 2. Under the facts of this case, if the original sale of realty passing under the third item of testator's will was illegal, a prescriptive title in favor of the present holder has nevertheless ripened, and a verdict for the defendant was demanded by the evidence. Therefore, even though some errors may have been committed at the trial, the verdict will not be disturbed.

February 18, 1883.

Wills. Estates. Title. Prescription. Verdict. Before Judge Pottle. Elbert Superior Court. March Term. 1882.

Reported in the decision.

M. R. STANSELL; JOHN T. OSBORN; PHIL. DAVIS, for plaintiffs in error.

W. M. & M. P. REESE; JOHN P. SHANNON, for defendant.

CRAWFORD, Justice.

1. The plaintiffs below brought their action of complaint against the defendant to recover six hundred and fifty acres of land. The questions of law controlling the case arise upon the construction of the will of Wm. Rich.

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from which it is claimed that the title of the plaintiffs springs. The material parts of which will are as follows:

"Item 1. \* \* \* My will is that, at the same time the above distribution is made, that my daughter, Sarah A. E. Edwards, have a negro woman loaned to her during her life, and then to the children of her body; said negro and what may subsequently fall to her in settlement with her mother, or final settlement at her mother's death, all to go into the hands of John Rich, as trustee for Sarah A. E. Edwards.

"Item 3. My will and desire is that my beloved wife, Sarah Rich, have the whole of the balance of my estate, both real and personal, during her natural life or widowhood; and at her death, I give and bequeath the whole of my estate to my five children, to them and their heirs forever, except Sarah A. E. Edwards in trust as above described; but if my wife should marry, my will is that on her intermarriage, that my property be equally divided between my wife and children, to them and their heirs forever, except Sarah A. E. Edwards as before excepted.

"Item 6. My will is that my son, John Rich, take charge of all the property falling to Sarah A. E. Edwards, and manage the same for the benefit of her and her children; and if he should die before she does, or before a settlement with the children, that in that case the court of ordinary appoint a successor to settle the same."

The land in controversy was that which, under the will, constituted the balance of the estate referred to in the third item thereof, and given to Mrs. Sarah Rich, the wife of the testator, for life or widowhood, and then to the sons absolutely, and to Sarah A. E. Edwards in trust, as above therein described. The record shows that in 1845, two years after the probate of the will, Sarah Rich and David A. Rich, executors of William Rich, executed to U. O. Tate, a warranty deed to four hundred acres of the land belonging to the estate of the said William Rich, at and for the sum of twelve hundred dollars. An agreement is also shown by which James, William, and David A. Rich, the sons of the testator, and Sarah A. E. Edwards, the daughter, consented that the executors might sell all the land and enough of the negroes to pay the debts of the This agreement bears date July 25, 1845. testator. the 21st of August, 1845, in consideration of \$2,100, James,

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William, David and Sarah Rich, and Sarah A. E. Edwards, as legatees under the will of William Rich, Sr., conveyed to the said Tate seven hundred acres more of the land of the estate. In November, 1845, William Rich, Jr., in consideration of \$1,200, relinquished and conveyed to said Tate all his interest in the estate of his father, William Rich, deceased.

On December 31, 1847, in consideration of \$500. David A. Rich, executor of William Rich, conveyed to said Tate two hundred acres more of the said land. John F. Edwards, trustee for Sarah A. E. Edwards, on May the 8th. 1848, in consideration of \$600, relinquished to said Tate all interest in the property held jointly by him as trustee with the said Tate, and which appears to cover all the land of the said William Rich, deceased.

There was much testimony offered on each side, which need not be further stated, in view of the questions of law which must govern the case.

The pleas of defendant were the general issue, title by prescription, and statute of limitations, and an equitable plea, setting up good faith and the payment of the debts of the deceased with the purchase money paid for the land.

The jury returned a verdict for the defendant, and the plaintiffs moved for a new trial, upon several grounds, the controlling one of which is the construction of the will of William Rich, by the court, in the charge to the jury. He held, and instructed the jury, that the meaning of the will was that Mrs. Edwards, the mother and grandmother of the plaintiffs, took as tenant in common with her childrenafter the death of her mother, and did not take a life estate in the property, with remainder over to her children.

The testator, by the first item of his will, in clear, unmistakable language, gives to his daughter, Mrs. Edwards a life estate in the negro woman which she was to have with remainder over to her children, but as to that which she was to receive from the division to be made at the

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death of the mother, and which is now in controversy, there are no words creating a life estate in her, or remainder over to the children. Had he said, "and what may subsequently fall to her in settlement with her mother, or in final settlement at her mother's death, all to go to her in like manner," or used any words having such import, then there would have been no question as to the creation of the life estate in her, with remainder over. But after creating the life estate clearly and unmistakably as to the negro woman, he simply provides that the balance which might fall to her should go into the hands of John Rich, as her trustee, without even the usual words excluding the marital rights of the husband, or extending the benefits of the trust, in this item, to any one else than his said daughter.

By the third item of the will, he directs a division of this particular property between his sons absolutely, and in trust as above described. This is but a repetition of the language used in the first item of the will touching this same property, and which he directs, at the mother's death, to go into the hands of John Rich, as trustee for Sarah A. E. Edwards. There are no words creating a life estate with remainder over in this item as to this property, and the mere use of words for the enforcement of a trust will not create such estates.

The sixth item of this will directs that the trustee manage the property falling to Sarah A. E. Edwards, and manage the same for her benefit and that of her children. It was made his duty also to settle with the children, and if he died before the mother or before a settlement, the ordinary was to appoint a successor to settle with them. Can this duty, put upon the trustee, change the character of the estate, and create a life estate and remainder over, where none is made by the will? The property now in dispute is the very property referred to as falling to Mrs. Edwards from her mother, at the time of her death, in final settlement, and which was to have gone into the hands of the trustee, and to have been managed by him for the

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benefit of herself and her children. The benefits to be enjoyed from the management of this property were immediate and in common, whilst the settlement with them was to take place whenever in law they were authorized to demand, by reason of their being of full age, such settlement.

The very words used would seem to indicate the possibility of a settlement before the death of Mrs. Edwards; they are, that if he should die before she does, or before a settlement with the children, then, etc., thus making the settlement with the children before his own death the matter to be attended to, and that not to be necessarily dependent upon the mother's death. But whether this be so or not, the failure of the testator to use words creating a remainder as to the land and other property falling in this division to his daughter, and confining these words only to the negro woman loaned to his daughter for life, does not authorize us by doubtful constructions to create such an estate.

The only estate which these children can take in this property, under the will of their grandfather, would be as tenants in common with their mother. See 3 Kelly, 201; 29 Ga., 403, 494; 35 Id., 4; 43 Id., 327; 49 Id., 410; 55 Id., 505; 62 Id., 253.

Construing, then, as we do, that Mrs. Edwards and her children were tenants in common in the property which was to have been divided at the death of Mrs. Sarah Rich, and that they were entitled to have the same as they severally arrived at age according to their respective interests therein, then it necessarily follows that there was no error in the judge's charge on this branch of the case.

2. This ruling controls the case, and settles the rights of all the parties thereto, when taken in connection with the facts as they appear by the record.

Mrs. Sarah Rich died in 1847, at which time her life tenancy in the property left her by her husband terminated, and whatsoever of interest, right, or title there was

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in said property belonging to Mrs. Edwards was recoverable. Her husband, who had been appointed her trustee, died in 1850, leaving her a feme sole. She lived until 1872, twenty-two years thereafter, without any suit to recover the property. John F. Edwards, one of the plaintiffs in this suit, had been of full age over twelve years when the suit was instituted. Sarah Colquitt, another of the plaintiffs, had been of full age fourteen years, and had been sui juris, under the act of 1866, twelve years before the commencement of the action. Mary Skinner, whose minor children, also, are suitors as the representatives of their deceased mother, had been of full age over twelve years at the time of her death, and had brought no suit.

Thus it appears that these parties, being under no disabilities, slept over their rights after they had accrued from twelve to fourteen years, and until whatever right of action they may have had was lost by reason of the prescriptive title acquired by those who held and occupied adversely, even if such had not been lost long before. it will be remembered that this land had been sold for a valuable consideration, and without any proof of actual notice to the first purchaser for more than thirty years, and this with the knowledge and consent, and receipt of navment by the trustee, as well as of those representing the estate of William Rich. And even conceding that that sale was illegal, the defendant and those holding subsequently thereto under the first purchaser, had themselves been in bona fide possession for about twenty years before any one sought to contest their title.

We hold, therefore, that even though some errors may have been committed at the trial, yet, as the evidence, under the law, demands the verdict, we will not disturb it. Judgment affirmed. Atlanta and Charlotte Air Line Railway vs. Ray.

# ATLANTA AND CHARLOTTE AIR LINE RAILWAY vs. RAY.

[This case was brought forward from the last term, under \$4271(a) et seq. of the Code.]

- The object of section 3938 of the Code in limiting the service of a
  juror to four weeks in any one year is two-fold: first, to equalize
  the burden of jury duty; and second, to avoid the evil of "professional jurors;" and it should be strictly and energetically enforced
  for those purposes.
- (a.) Although a juror may have served four weeks during a term of court which began in December, yet he would not thereby be disqualified from another week of service in the succeeding year, although at the same term, which continued into the new year. The prohibition is against service for more than four weeks in a year, which means a calendar year.
- 2. On the trial of an action for damages by an employé of a railroad against the company, based upon the insecure fastening of a stove in one of its cars, resulting in damage to the plaintiff, it was not error against the defendant to charge that it was not liable unless it "knew or should have had reason to know," that the stove was in an unsafe condition.
- (a.) The duty rested on the company to properly select and superintend its operatives, its machinery, appliances and appointments of every sort used in its business. It was a guarantor that all reasonable and proper care had been and should be exercised in the performance of those duties, and its liabilities should be limited to a failure to meet its obligations in this respect.
- 3. If it was the duty of a flagman to make fires in the stove on one of the cars of a railroad company, which he did; and if there was a defect in the manner in which the stove was fastened, such as to make it unsafe to build a fire therein on account of the dangers incident to railroad travelling; and this was such an open and patent defect as he could have easily seen, but on account of his own negligence he carelessly overlooked it and failed to report it that it might be remedied, then he was guilty of contributing, by his own negligence and carelessness, to the injury which he received, and was therefore not entitled to recover.
- 4. A flagman on a railroad whose place was in the rear car when in motion, but who had duties which, on occasion, might call him to other parts of the train, having brought suit against the railroad company for an injury received while he was in another portion of the train, resulting from the overturning of a stove in the car where he was, it was necessary for him to show affirmatively that, at the time he was hurt, his duty required him to be at the place where the injury occurred.
- (a.) That, by reason of the shock or the lapse of time, the plaintiff has

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lost the memory which would enable him to establish this fact, is his misfortune, but does not vary the law.

February 27, 1883.

Railroads. Damages. Negligence. Master and Servant. Before Judge CLARK. City Court of Atlanta. December Term, 1881.

Reported in the decision.

HENRY HILLER; L. J. WINN, for plaintiff in error.

HOPKINS & GLENN, for defendant.

CRAWFORD, Justice.

Samuel C. Ray, the defendant in error, was employed as a flagman by the Atlanta and Charlotte Air Line Railroad Company, to run on its passenger train from Atlanta, Georgia, to Charlotte, North Carolina, and back. Whilst so employed and engaged in its service, near Gaffney City, South Carolina, the train ran off, and the car in which he was riding was thrown down an embankment, and the stove, which had fire in it, turned over upon him, and he was severely injured.

He brought this suit to recover damages from the company, because of its negligence and carelessness in not having its stove in said car so securely fastened as to have prevented the injury which he received. He further alleged negligence in the company, in that it had a schedule for the train which was too fast for safety in the unsafe condition of its track, and that it was also otherwise negligent. The case, however, was tried upon the first ground only, and, saving a preliminary question, it is from that alone the exceptions spring which bring it up to this court.

1. The preliminary question arose in the selection of the jury to try the case. The defendant challenged one A. W. Hoffman, as being an incompetent juror, upon the Atlanta and Charlotte Air Line Railway rs. Ray.

ground that he had already served four weeks at that term of the court, and was therefore disqualified under section 3938 of the Code, which declares that no person shall be allowed to serve as a traverse juror longer than that time in any one year.

The record shows that the juror was in the fifth week of his service at that term, which began in the month of December of the preceding year, and had then reached into the month of January of the succeeding year. The iudge refused to sustain the challenge, and allowed the juror to serve. The law is that no person shall be compelled to serve as a grand or petit juror more than four weeks in any one year. Nor shall he be allowed to serve as a petit juror in the superior courts, or as a tales juror in any criminal case, or on any jury in other courts, more than four weeks in any one year. The legislature, in passing this law, intended to lighten and equalize the burden of jury duty upon the citizens, in the first place, and therefore granted this exemption, after the full performance of the service required. In the next place, it intended to exclude those who sought such service, and were known to bench and bar as "professional jurors," and who, from constant attendance upon the courts, had a pretty thorough knowledge of the important cases to be tried, and whose opinions, inclinations and prejudices were not unknown to others who had business and duties in the court. Hence this act was passed. declaring that they should not be allowed to serve longer than the time provided.

It is true that this is a statute which should be construed liberally, so that the evil complained of might be suppressed, and the remedy advanced. But this juror was only in the first week of his service for the year when he was challenged, and, as section 4 of the Code requires that whenever the word year is used in the statutes, it shall be construed to mean calendar year, there was no error in allowing the juror to serve. We think, however, that this aw should be strictly and energetically enforced by the

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judges in not allowing persons thus disqualified to serve. Whilst there are many men of good character and honest purpose who have availed themselves of the benefits derived from this service, yet it may be that all are not actuated by the best of motives. But, whether so or not, the law says that they shall not be allowed thus to serve, and this should be sufficient for the courts.

2. The case went to trial upon the merits, and, under the evidence and instructions of the court, the jury found for the plaintiff the sum of \$6,500 for his damages. The defendant made a motion for a new trial, because of the errors committed by the court in the charge given, and in the refusal to charge certain written requests asked for by his counsel.

Out of the many questions brought up by the record, there are but two which go to the vitals of the case and necessary to be considered here. The judge below narrowed the issues to be tried by the jury to the question of negligence in the defendant, in not having the stove so securely fastened as to provide against such accidents as were incident to railroad traveling; and to the negligence of the plaintiff in being away from his post of duty at the time he was injured.

The great error alleged to have been committed by the jndge in his charge, was in instructing the jury that "the company is bound to furnish safe machinery, equipments, appointments and everything of that sort necessary for the running of trains; and, therefore, I charge you that, in regard to the allegations of plaintiff as to this stove not being securely fastened, the placing of that stove there originally was the act of the company, and not the act of its servants, and hence, if you believe from the evidence that that stove, when it was originally put there, was not reasonably safe and secure to provide against accidents that were usual and known to be incident to transportation by the train, that the company would be liable for it, provided the company knew, or should have had reason to know, of the condi-

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tion of the stove; and it is a question for you to say whether that stove originally was put there insecurely, for such purpose, and if it remained so up to the time of this accident, you have a right to hold the company responsible for whatever damage may have occurred from that stove."

Under our view of the law, we are of opinion that the judge did not err against the defendant in charging the jury that it was not liable, unless it "knew or should have had reason to know," that the stove was in an unsafe condition. We think that the error committed in this connection was in not charging, as he should have done, that the duty of the defendant was to properly select and superintendent its operatives, its machinery, appliances and appointments of every sort used in its business. That it was a guarantor that all reasonable and proper care had been, and should be, exercised in the performance of those duties, and its liability should be limited to a failure to meet its obligations in this respect.

- 3. Another error which we think was committed by the judge, and to which his attention was called by the 16th request of the defendant, was that, if it was the duty of the plaintiff to make fires in that stove, and he did so, and there was a defect in the manner in which it was fastened. such as to make it unsafe to fire it up on account of the dangers incident to railroad travelling, and this defect was open and patent, such as he could have easily seen, and yet, on account of his own negligence, he carelessly overlooked it, and failed to report it that it might have been remedied, then he was guilty of contributing, by his own negligence and carelessness, to the injury which he received, and was, therefore, not entitled to recover. Cooley on Torts, 563; 54 Ga., 509; 55 Ib., 133, 279; 29 Conn., 548; 81 Penn. St. R., 366; 31 Mich., 429; 75 Ill., 106; 101 Mass., 50; 47 Miss., 404.
- 4. Again, we think that, under the decisions of this and the courts of other states, the judge should have instructed the jury that, the plaintiff being an employé of

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the defendant, before he was entitled to recover it was necessary for him to have shown affirmatively that, at the time he was hurt, his duty required him to be at the place where the injury occurred. There is no dispute, as we gather it from the record, that his duties were those of a flagman, and that whilst the train was in motion his place was in the rear car, that he might discharge the duties of his position. It is however said, that he had other duties which, on occasion, might call him to other parts of the train. If this be admitted, then we have the fact that the proper place for the plaintiff was in the rear car, unless special duty called him to the front, and being hurt in that part of the car, he was bound to show that he was there in the discharge of such special duty. His own testimony fails, just at this important point, to show any occasion at that time, the cars being at full speed, for his presence near this stove. Not only this, but it is shown that he was there in a sitting posture on the arm of a passenger Even if he had duties calling him there, he should have attended to them, and returned without delay, unless he chose to take the risk of an accident such as this without the liability of the defendant to answer therefor.

If the fact be that an emergency or duty required his presence in dangerous proximity to this stove, when, without such emergency or duty, his place, as he swears himself, was in the rear car, then he should show affirmatively the facts making the emergency or duty. This rule was clearly laid down in the case of the Central Railroad vs. Sears, 61 Ga., 279. And if the plaintiff, by reason of the shock, or the lapse of time, has lost the memory which would enable him to establish this important fact, it is his great misfortune, but the law cannot bend to benefit the case of any suitor, by dispensing with the rules necessary to the rendition of a judgment in his favor. 56 Ga., 588.

Whilst laying down the legal principles governing this case, it is to be remembered, that all the rules of procedure in the trial are such as are prescribed for our courts

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in the ascertainment of facts. Hence, whether the defendant properly selected and superintended its operatives and agents, its machinery, appliances and appointments of every sort used in its business; and whether all reasonable and proper care had been exercised in the performance of these duties, so as to meet its obligations; and whether the plaintiff, on his part, had properly discharged his duties and obligations to the defendant by obedience to its orders, or was there any omission of duty on his part in failing to notice and report any defect in the fastening of the stove, which may have been open and patent, are all questions of negligence, to be settled by the jury under the instructions of the court, and to be gathered not only from the testimony of the plaintiff, and the agents of the defendant, but from all the facts and circumstances of the case as shown by the proof.

Judgment reversed.

# MOTT vs. CENTRAL RAILROAD.

The adult son of one who has been killed by a railroad, and who has left neither widow nor minor child, cannot maintain a suit against the corporation to recover damages for the homicide.

April 24, 1883.

Actions. Parent and Child. Torts. Before Judge CLARK. City Court of Atlanta. December Term, 1882.

Mott sued the Central Railroad for the homicide of his father, R. L. Mott. The declaration, besides alleging the manner of the death of deceased from being run over by the train of defendant, and charging negligence therein, alleged that "plaintiff is the only child of Randolph I. Mott; there is no widow." Plaintiff admitted that he was more than twenty-one years of age at the time of bringing the suit.

Defendant demurred to the declaration on the ground

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among others, that plaintiff was not entitled to sue as a "child" of the deceased. The demurrer was sustained, and plaintiff excepted.

SMITH & RUSSELL; HOPKINS & GLENN, for plaintiff in error.

A. R. LAWTON; HENRY JACKSON, for defendant.

HALL, Justice.

This record presents for determination but a single question. which arises under Code of 1882, §2971, and is whether the adult child of a party who has been killed by a railroad train, and who has left neither widow or minor child. can maintain a suit against the corporation, to recover damages for the homicide? The section in question, as it stood in the Code of 1873, was as follows: "A widow, or if no widow, a child or children may recover for the homicide of the husband or parent, and if suit be brought by the widow or children, and the former, or one of the latter. dies pending the action, the same shall survive in the first case to the children, and in the latter case to the surviving child or children." The Code of 1882 makes this addition: "The plaintiff, whether widow, or child or children, may recover the full value of the life of the deceased, as shown by the evidence. In the event of a recovery by the widow, she shall hold the amount recovered, subject to the law of descent, just as if it had been personal property descending to the widow and children from the deceased, and no recovery had, under the provisions of this section and the law of which it is amendatory, shall be subject to any debt or liability of any character of the deceased husband or parent."

. In this addition is embodied the provisions of an act, approved December 16th, 1878, and which is entitled "an act to amend §2971 of the Code of 1873, so as to provide that, in case of suits under said section, either the widow or

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children, as the case may be, shall recover the full value of the life of the deceased, and prescribing the manner in which the widow shall hold the amount recovered, and for other purposes." This act makes three additions to the section, as it was codified prior thereto from the acts of 1850, Cobb's Dig., p. 476; acts 1855, pam., p. 155. First: It provides a measure of damages in case of a recovery. Second: Where the recovery is had by the widow, it provides for the descent of the property. Lastly, it exempts the amount recovered from the debts and liabilities of the husband or parent.

The section, as it stood prior to the passage of this act, had been several times interpreted by this court. In David vs. The Southwestern Railroad Company, 41 Ga. 223, it was held that, if a widow die pending a suit for the homicide of her husband, the right of action for such homicide survives to the children, and in such last suit, the measure of damages is the injury to the children, to be measured as in case of the widow, by a reasonable support for them, according to the condition, etc., of their father, and according to the expectation of his life as found by the mortuary tables." Inasmuch as a father is bound ordinarily for the support of his children only during their minority, the necessary inference from this decision would have been that only minor children were entitled to the action, in case there was no widow, or the widow had died during the pendency of the suit brought by her; but McCay, J.. delivering the opinion of the court, was not content to leave this important matter to inference, however clear and strong that inference was. He says: "The measure of damages in such a case is the present worth of a reasonable support for them during minority, according to the expecta tion of their father's life," etc. M. & W. R. R. Co. w. Johnson, 38 Ga., 433. The act of 1878 effected no other change in this decision than the measure of damages which it laid down. If it had been the intention of the legislature to have extended this right to adults as well as

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to minors, how easy would it have been to have so said. This statute, in its original form, has always been so construed by this court as not to extend this right, by implication, to others than those expressly named. Thus, in the case of The Georgia R. R. Co. vs. Wynn, 42 Ga., 331, this remedy was denied to the husband for the homicide of his wife, because he did not have it by the common law, and it was not given to him by the enactments under consideration. For other instances of strictness in the application of the law, see Atlanta and West Point R. R. vs. Venable, 65 Ga., 56; and Daly vs. Stodard, 66 Ga., 145. In this last case, Jackson, C. J., p. 148, concludes his opinion with these words: "The statute should be construed strictly: at least, it should not be extended to embrace this class of cases, and will not be so extended without additional legislative enactments."

A very broad construction would be required to deduce from these changes as to the measure of damages and the descent of the property, in case of the widow's death, the right of an adult child to recover, where there was neither widow nor minor child. Such a construction, it seems to us, would be a wide departure from the manifest purpose of the legislature, as it is to be gathered from the scope and design of this act, taken in connection with the decisions that led to its passage. In all interpretations, the courts are enioined to look diligently for the intention of the general assembly, keeping in view, at all times, the old law, the evil and the remedy. Code, §4, par. 9. In ascertaining this intention, we are first to apply to the words their ordinary signification (Ib., par. 1; 4 Ga., 485, 486), and to interpret them according to their common sense. 46 Ga., Noscitur a sociis is a familiar rule of construction. and ascertains the precise meaning of words from others with which they are associated and from which they cannot be separated without impairing or destroying the evident sense they were designed to convey in the connection Applying these rules to that portion of the law nsed.

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which prescribes how the property shall descend and be distributed among the children, we cannot entertain a serious doubt that the legislature meant to use the word "children" in a limited and specific, and not in a generic or general sense. The precise words are "the widow and children." What widow What children? The widow who had the right to bring the suit and recover; the children who, under certain contingencies, might likewise bring this suit, or to whom it would survive in certain other contingencies, and who could recover. None others are designated by this law. And who are they thus designated! It is evident, from the decisions upon previous legislation, that they were such only as were entitled to a support from the deceased; such as were dependent members of the family at the time of the homicide of the parent. The right had, by previous decisions, been confined to them, and the general assembly did not see proper to change these decisions by extending the rule laid down by them to another class of children than those embraced in its It is evident that this act was passed with a clear and intelligent understanding of the results of previous legislation and the interpretations given by the courts to that legislation, and that no other change of the rules resulting from these interpretations than those specified were designed or intended.

This view dispenses with the necessity of determining the question made upon the exceptions taken pendente lite by the defendant, as it effectually disposes of the case.

Judgment affirmed.

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## BOZEMAN vs. SINGER MANUFACTURING COMPANY.

- Since the adoption of the constitution of 1877 and the passage of the act of 1879, it is the duty of justices of the peace to select some central and convenient place in their respective districts at which to hold their courts, and judgments rendered at other times and places are void.
- (a.) In Harbig vs. Freund & Co., decided at the last term, local laws were in operation until changed, and the judgment was rendered prior to the act of 1870. In this it differs from the present case. March 13, 1883.

Judgments. Nullities. Justice Courts. Before Judge Brown. Cobb Superior Court. November Term, 1882.

In addition to the report contained in the decision, it is only necessary to state that the bill of exceptions assigned error on the part of the court in dismissing the case, on appeal from a justice's court, because it was admitted that such court was held at a different time and place from that regularly established for the district. Plaintiff in error (defendant below) insisted that, after plaintiff had selected his own court and brought suit therein, and no plea to the jurisdiction had been filed or objection thereto been made, but a plea of set-off had been filed, on which defendant recovered, on the appeal plaintiff could not defeat this recovery by a motion to dismiss.

PHILLIPS & SESSIONS, for plaintiff in error.

A. S. CLAY, for defendant.

HALL, Justice.

The Singer Manufacturing Company sued Bozeman in the justice's court, held for the 898th district Georgia Militia, Cobb county. To the summons issued in the case, Bozeman appeared and answered by pleading a set-off, and upon the trial, he had a verdict and judgment for the excess of his over the plaintiff's demand. From this judgBozeman vs. Singer Manufacturing Company.

ment the plaintiff appealed to the superior court of Cobb county, and the case coming on for a hearing there, the plaintiff moved to dismiss it, for the reason that the justice's court rendering the judgment was held at a different time and place from that selected for the purpose. The facts involved in this motion being admitted, the court granted the motion and dismissed the suit, and to this judgment the defendant excepted, and the correctness of this ruling makes the only question for our determination. It is the duty of justices of the peace, and they have authority expressly given them, to select some central and convenient place in their respective districts, at which to hold their courts, of which they are to give ample public notice, and also to keep their offices within said districts, except in towns and cities embracing more than one district, where they may hold their courts, etc., at some central or convenient point within the limits of such towns and cities. Code, §457, par. 1. As to the number of times and conditions upon which such changes are to be made, see Code, \$458, 459, 460, 461. And it is expressly declared that all judgments of such justices rendered in any civil cause anywhere else than at the place for holding their courts lawfully appointed, are void." Code, §462. By article 6, \$7. par. 2, of the constitution, they are required to hold monthly courts at fixed times and places within their respective districts. Code, \$5153. There is nothing in this case which brings it within Harbig vs. Fround & Co., determined by this court at the last term, and not yet published. That case was under a local law applicable to the city of Augusta, and was commenced and determined prior to the passage of the act of July 21, 1879 (Code, \$\$4130, 4130 (a)-4131), the purpose of which was to carry into effect \$4. par. 1 of the same article of the constitution (Code, \$5156). which required the general assembly to pass laws to establish lish uniformity of practice, process, etc., in all courts of similar grade. This case was never under any other than the general law, as it existed prior to the adoption of the

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present constitution, and if it had been, it is sufficient to state, in reply to the position assumed by counsel for plaintiff in error, that it was commenced subsequent to the passage of the above cited act of July 21, 1879.

Judgment affirmed.



- Under §3457 of the Code, in a suit on an open account, where there has been personal service and the case is in default, the plaintiff may take a verdict as if each of the items were proved by testimony.
- (a.) Under the act of 1861, in such cases the plaintiff was entitled to a verdict. Under the constitution of 1868, the court rendered judgment by default in such cases, and the word "judgment" was inserted in the Code of 1873, in order to make it conform to the constitution. Under the constitution of 1877, verdicts are rendered in such cases, and it should so appear in the Code.
- 2. A suit on a receipt for sundry promissory notes and accounts to be collected by the maker of such receipt, with an allegation that he has collected and failed to pay over certain sums, is not an action on an open account, in the sense of the act of 1861, and a verdict cannot be taken thereon without proof, by reason of personal service and absence of defence.
- (a.) Nor is this such an unconditional contract in writing as to authorize a judgment, under the constitution of 1877.
  March 8, 1888.

Practice in Superior Court. Verdict. Judgment. Constitutional Law. Before Judge Hoop. Early Superior Court. October Adjourned Term, 1882.

Cole & Company sued Fryer on the following receipt: "STATE OF GEORGIA—Early County.

Received of T. J. Flake, agent for M. Cole & Company, nurserymen, Atlanta, Georgia, the following fruit tree notes and the fruit trees for which said notes are given, with instructions to collect said notes, if possible, or to dispose of the trees to the very best advantage for the benefit of said company, for which service the said company, through their agent, agree to pay the value of five per cent for money collected without litigation, and ten per cent for money collected by litigation. Returns to be made to M. Cole & Company, Atlanta, Georgia, on the

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15th day of January, 1874, and on the 15th day of March, 1874, of the money collected and the amounts remitted by express, and as often thereafter as a faithful administration of the business left in charge may require."

[Then follows a list of notes, most of them being for fruit trees, and some based upon other considerations.] The declaration alleged that the defendant had sold these fruit trees, had collected the money therefor, and had collected also \$28.73, for certain lumber, and that he had never accounted for or remitted the money so collected.

When the case was called, counsel for plaintiffs moved for a judgment. Counsel for defendant objected, on the ground that no process was attached to the declaration. On examination, it appeared that process was so attached, but counsel stated that none was attached to the copy served. The court inquired whether defendant proposed to open the default and plead, but he declined to do so. Personal service appearing from the sheriff's entry, the judge permitted plaintiff's counsel to take a verdict without introducing proof. Defendant excepted.

E. C. Bower, by brief, for plaintiff in error.

R. H. POWELL; MYNATT & HOWELL, for defendants.

JACKSON, Chief Justice.

This case rests on a single point: Does the paper sucd on come within the statute that, where there is personal service on the defendant, a verdict may be taken without proof of the open account sought to be recovered, no defence being made thereto?

1. The Code, §3457, declares, "When any defendant shall fail to appear and answer at the return term of the petition and process, the court shall enter default on the docket, which shall be considered a judgment by default without a formal entry thereof, and the plaintiff's claim allegation or demand shall be tried, in all cases of default.

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by a jury, except as provided elsewhere in this Code, but no such trial shall, in any case, be had at the first term, except specially provided for by law: Provided that in all cases of suits on open accounts, in the several courts of this state, where the writ or process has been served personally, and there is no defence made by the party sued, either in person or by attorney, at the time the case is submitted for trial, the case shall be considered in default, and the plaintiff shall be permitted to take [judgment] as if each and every item were proved by testimony."

The first part of the above section was codified from the act of 1799, Cobb's Dig., p. 486; the proviso from the act of 1861, p. 59, and the constitution of 1868, Art. 5, sec. 3 par. 3. To make the act of 1861 conform to that clause, of the constitution of 1868, in place of the word "verdict" in the act of 1861 is substituted the word "judgment," in brackets in the proviso in the Code as, at the time of the codification of 1873, by the constitution of 1868, the jury gave no verdict, but the court entered judgment in such a case.

In the view we take of the codification of the act of 1861, and the alteration of the word "verdict" to "judgment" therein, we are clear that, inasmuch as the constitution of 1868 is not of force, and by that of 1877, no judgment could be rendered by the court on an open account, but only on an unconditional contract in writing, it is the verdict now which the jury may return by the act of 1861, which should be in the Code, and not the word judgment.

2. So that the naked question is this: Is a suit on a receipt for sundry promissory notes and accounts to be collected by the defendant, with an allegation that defendant has collected and failed to pay over the sums collected, an action on an open account in the sense of the act of 1861? We cannot so think. On the contrary it is a suit on a writing, on a receipt for papers, including several promissory notes as well as accounts, and an agreement to make returns therefor at certain times, with commissions

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for collecting the same without suit, and higher commissions if suit is found necessary to collect any or all of the notes and accounts.

It reads as follows:

"Received \* \* \* the following fruit tree notes and the fruit trees for which said notes were given, with instructions to collect said notes if possible, or to dispose of the trees to the very best advantage for the benefit of said company, for which service the said company agree to pay the rate of five per cent for money collected without litigation, and ten per cent for money collected with litigation. Returns to be made to M. Cole & Company, Atlanta, Georgia, on the 15th of January, 1874, and on the 15th of March, 1874, of the money collected, and the amounts remitted by express, and as often thereafter as a faithful administration of the business left in charge may require."

To this is appended a list of twenty odd promissory notes on various persons and a receipt for lumber confided to another person for sale; and then the entire paper at the end of the receipt and the list of notes, etc., is signed by defendant the 25th of December, 1873.

Such a receipt for such collection of notes and for another receipt on another man to bring him to account for lumber, is not an open account, so as to authorize, under §3457 of the Code, a verdict, without proof of the collections as alleged in the declaration and refusal to pay as also alleged, nor is it such an unconditional promise in writing as to authorize a judgment under the constitution of 1877.

Judgment reversed.

# SAPP vs. FAIRCLOTH.

- Where a creditor, his debtor and a third person who owes the debtor agree in parol that such third person shall be substituted for the debtor and that the latter shall be released, the case is not within the statute of frauds, so as to require the agreement to be in writing, but the debt is extinguished as to the debtor, and the third person becomes, by substitution, the debtor in his place.
- A purchaser of land gave his note in part payment therefor; the note was negotiated before due; the title proved not to be perfect; it was agreed that the vendor should pay two-thirds of the note

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and the vendee one-third. It was subsequently agreed by the vendor, the vendee and a third party who owed the vendor, that the latter should pay the two-thirds of the vendee's debt, instead of the vendor, who was thereupon released; the person thus assuming to pay failed to do so, and suit was brought by the vendee:

Held, that if the debt of the third party to the vendor was due, and the debt which the vendor had agreed to pay was also due, the vendee could recover; and he would not be compelled to pay the note before bringing suit.

3. The charge of the court was not objectionable on the ground that it failed to cover the issues in the case. If more specific instructions on any branch of the case were desired, a request therefor should have been made. Concise and pertinent charges are to be commended.

March 20, 1883.

Debtor and Creditor. Substitution. Statute of Frauds. Charge of Court. Before Judge Bower. Mitchell Superior Court. November Term, 1882.

Reported in the decision.

- I. A. Bush: Jackson & King, for plaintiff in error.
- D. H. POPE; W. N. SPENCE; HARRISON & PEEPLES, for defendant.

CRAWFORD, Justice.

The facts material to an understanding of this case are. that Jos. H. Spence sold to Faircloth, the defendant in error, certain lands for \$500, and in part payment thereof Faircloth gave him his note for \$300, which Spence indorsed and transferred before due to Welch & Bacon. Spence's title to the land sold not being perfect, and Faircloth's note having been traded and sued, Spence agreed with Faircloth to pay two-thirds of the principal and interest on the debt, and leave him to pay only one-third thereof.

Spence also sold certain other lands to John G. Sapp, the plaintiff in error, for which Sapp was to pay him \$1,700. About the time of this trade, a contract was made

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between Spence, Sapp and Faircloth, that Sapp should pay the two-thirds of the Welch & Bacon debt, upon which Faircloth and Spence were then sued, and that, in consideration of this payment so to be made, Faircloth released Spence from his obligation to pay it. Sapp failed to comply with his part of the contract thus made, and Faircloth had to pay it all; he therefore brought this suit to recover the amount so paid. Sapp resisted the payment and relied upon the statute of frauds for his defence. The jury, under the evidence and charge of the court, found in favor of the plaintiff for the amount claimed. The defendant moved for a new trial, which the judge refused, and he assigns error thereon.

The main grounds relied upon for a new trial are, that the judge erred in charging the jury that the contract as set forth is not such a contract as comes within the statute of frauds; and that, if they believed from the evidence that the amount which Sapp owed Spence was due before this suit was brought, and that the payment of Sapp on the Welch & Bacon debt was due under the contract, and that he had assumed to pay it under such a contract as was set out in the declaration, and on being requested so to do, had refused, before this suit was brought, to pay it, then he would be liable to Faircloth; and it would not be necessary for Faircloth to be compelled first to pay it, before he brought suit against him. And because the court failed to charge on all the issues made in said case.

1. The liability of the plaintiff in error, under the facts disclosed by the record, is settled by the ruling in the case of Anderson & Tucker vs. Whitehead, Eggleston & Co., 55 Ga., 277. It was there held that "Where creditor and debtor, and another person who owes the debtor, agree that the latter person shall be substituted for the debtor, and the debtor be released, all in parol, the case is not within the statute of frauds, and the agreement need not be in writing, but the debt is extinguished as to the debtor,

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and the third person becomes the debtor in his place." See also, 60 Ga., 456. The testimony shows that Spence, being the debtor of Faircloth, agreed to pay two-thirds of a note of his which he, Spence, had traded and indorsed to Welch & Bacon; and that Sapp, being the debtor of Spence, it was agreed between the three that Sapp should be substituted for Spence, and he to be released by Faircloth from his obligation to pay the amount as agreed between them. We think, therefore, that the judge laid down the law correctly in his charge to the jury on that point.

- 2. Upon the next ground there can be no question of its correctness, if the amount owed Spence by Sapp was due, and the amount on the Welch & Bacon debt was also due, and Sapp had agreed to pay it under the contract as set out and sworn to by the plaintiff below, and this whether Faircloth had paid it or not, as the defendant had agreed to pay it at a particular time, which time had passed before the suit began.
- 3. That the judge failed to charge on all the issues made in the case, and failed to charge as to any of the defences set up by the defendant, is not sustained by the record. Where the judge charges the law applicable to the facts of a case as shown by the proofs, and then instructs the jury that if, under the testimony and rules of law which he has so given them in charge, they believe that the plaintiff has made out his case in all its essential requisites. then it would be their duty to find in his favor; but if, on the other hand, they do not believe that the plaintiff has made out his case by satisfactory testimony, under the rules of law laid down, then it would be their duty to find for the defendant, this is sufficient to cover both sides of the case. And if counsel on either side should desire more specific charges on any particular branch of the case, they should, by request in writing, ask him to do so. Our experience on the circuit bench and observation upon this is, that there are more errors committed by attempting to charge

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too much than too little; a short, concise charge never confuses a jury, whilst a long and diffuse one is almost sure to have that effect.

Judgment affirmed.

(†EORGIA RAILROAD et. al. vs. SMITH et al., Railroad Commissioners, et al.

#### [This case was argued at the last term, and the decision reserved.]

- 1. The object of the constitutional provision conferring power upon the legislature to regulate railroad freights and passenger tariffs, to prevent unjust discrimination and require reasonable and just freights and tariffs, and making it the duty of the legislature to pass laws in furtherance of this provision, was to give proper protection to the citizens against unjust rates for the transportation of freights and passengers over the railroads of the state, and to prevent unjust discrimination, even though the rates might be just. It was not expected that the legislature should do more than pass laws to accomplish the ends in view. Nor were they required to enter into the details of settling freights and tariffs over all the railroads in the state. The railroad commissioners are officers appointed to carry into execution the laws passed by the legislature, and are constitutional officers.
- (a.) The powers of the railroad commissioners are not legislative.

  The power to adopt rules and regulations to carry into effect a law already passed, differs from a power to enact the law.
- Acts of incorporation granting exclusive privileges to the corporators are always to be strictly construed, and whatever is not expressly given therein, or not necessarily implied therefrom, is withheld.
- (a.) The 12th section of the charter of the Georgia Railroad and Banking Company was as follows: "That the said Georgia Railroad Company shall, at all times, have the exclusive right of transportation or conveyance of persons, merchandise and produce over the railroad and railroads to be by them constructed, while they see fit to exercise the exclusive right; provided that the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement, for every hundred miles, and five cents per mile for every passenger":
- Held, that the exclusive right granted by this section, was the right of transportation or conveyance of persons, merchandise and pro-

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duce over the railroad and railroads to be by them constructed. The state did not contract with the company to guarantee to it the exclusive right to charge the maximum rates named.

HALL, J., dubitante as to last point.

February 27, 1883.

Railroads. Constitutional Law. Officers. Charters. Corporations. Before Judge Simmons. Fulton County. At Chambers. May 26, 1882.

Reported in the decision.

J. B. CUMMING; A. R. LAWTON, for plaintiffs in error.

CLIFFORD ANDERSON, attorney general; MYNATT & Howell, for defendants.

CRAWFORD, Justice.

The Georgia Railroad and Banking Company, denying the power of the railroad commission of the state of Georgia to regulate freight and passenger tariffs over its road, has filed this bill that the right of the said commission to exercise this power may be judicially determined. This power is denied:

- (1.) Because, by article 4, section 2, par. 1, of the constitution of Georgia, the duty is imposed on the general assembly to regulate freight and passenger tariffs.
- (2.) Because the act of October 14, 1879, is unconstitutional and void, as being an attempt to delegate legislative powers to said railroad commission. And because it is in conflict with the constitution of Georgia, which forbids the imposing of excessive fines, or inflicting unusual punishments.
- (3.) Because the charter of said company is a contract between the state and the company, by which the company has the right to charge any rates of freight and passenger tariffs not exceeding those limited by its charter; whereas, the said commission, under the authority given it

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by the act of October 14, 1879, forbids the said company, under heavy penalties, from charging the rates allowed by said contract. Wherefore the said act is, by virtue of par. 1, section 10, article 1, of the constitution of the United States, which prohibits the states from passing any law impairing the obligations of a contract, unconstitutional, null and void.

The prayer of the bill is: (1.) That the act of October 14, 1879, be declared null and void. (2.) That it be declared inoperative against the Georgia Railroad and Banking Company. (3.) That the said commission be perpetually enjoined from prescribing rates of fare and freight over the Georgia Railroad and its branches, or in any manner enforcing against it the provisions of the said act of October 14, 1879. (4.) For general relief.

The chancellor below, after considering the bill and exhibits of complainant, and cross-bill and exhibits of defendants, refused the injunction prayed for, and that refusal is assigned as error.

The questions to be determined by this litigation are:

(1.) Whether the act establishing the railroad commission of the state of Georgia, with its powers and duties, is not unconstitutional and void, because it is the duty of the legislature, under the constitution, to regulate freights and passenger tariffs, and this act seeks to delegate this power to the said commission.

(2.) Whether the said act, in so far as it attempts to interfere with the chartered rights of the Georgia Railroad and Banking Company, does not violate that clause of the constitution of the United States which prohibits the states from passing laws impairing the obligation of contracts.

1. The constitution of 1877 confers upon the legislature the power and authority of regulating railroad freight and passenger tariffs, preventing unjust discriminations, and requiring reasonable and just rates of freight and passenger tariffs. It further makes it the duty of the legislature to pass laws, from time to time, to carry into effect

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this constitutional provision, and to enforce the same by adequate penalties.

For this purpose and to this end was the act under consideration passed. It declares, among other things, substantially that, if any railroad doing business in this state, shall charge, collect, demand, or receive, more than a fair and reasonable toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its track, the same shall be deemed guilty of extortion, and upon conviction, dealt with as by the said act provided.

In order that fair and reasonable tolls, or compensation for the transportation of passengers and freight, might be certainly had, it was also provided that there should be three railroad commissioners appointed, whose duty it should be to make reasonable and just rates of freight and passenger tariffs, to be observed by all the railroad companies doing business in the state on the railroads thereof. And that a schedule of such rates should be made for each railroad doing business in the state, which said schedule should be deemed and taken in all the courts of the state as sufficient evidence that the rates were just and reasonable charges for the transportation of passengers and freights and cars upon the railroads, in all cases brought against any road involving unjust discriminations or improper charges. Adequate penalties were likewise provided for the enforcement of the rules and regulations of the said commission for the establishing of reasonable and just rates to be observed by the railroad companies.

Thus it appears that the constitution provided that the legislature should have power to regulate the railroad freights and passenger tariffs, and to require reasonable and just rates for both; that it made it also the duty of the legislature to pass laws necessary for its execution; and that, in pursuance of that duty, the law complained of was passed.

The object of the constitutional provision and the legis-

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lative enactment was to give proper protection to the citizen against unjust rates for the transportation of freights and passengers over the railroads of the state, and to prevent unjust discriminations, even though the rates might be just. It was not expected that the legislature should do more than pass laws to accomplish the ends in view. When this was done, its duty had been discharged. All laws are carried into execution by means of officers appointed for that purpose; some with more, others with less, but all must be clothed with power sufficient for the effectual execution of the law to be enforced.

Legislative grants of power to the officers of the law to make rules and regulations which are to have the force and effect of laws, are by no means uncommon in the history of our legislation. I need only mention the power given to the judges of the supreme and superior courts of this state to establish rules which, if not in conflict with the constitution of the United States, of this state, or the laws thereof, are binding and must be obeyed. And it has never been claimed that they were unconstitutional because they had not been passed by the legislature and read three times, and on three separate days, in each house of the general assembly.

The act of October 14, 1879, provides that fair and reasonable rates only shall be charged by the railroads of the state. Did the constitutional convention, by paragraph 1 section 2, article 4, intend more than the passage of a general law, such as this, to carry into effect the clause bere referred to? It certainly was not contemplated that the details of rates to be fixed over the many miles of railway in the state, should be settled and determined by the legislature. The many influences that combine to cause changes in the ever varying vicissitudes of trade and travel were neither overlooked nor forgotten by that body. The utter impossibility of preparing by the legislature just and proper schedules for the various railroads, with their differences of length, locality and business, appears to us to be

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so clear and manifest as that to have entertained it would have been absolutely absurd. And especially so, when it is remembered that schedules just and right, where arranged for the months of winter, might be ruinously unjust and wrong for the months of summer; or that such as were proper for the year of the meeting of the general assembly might the succeeding year well nigh bankrupt every railroad corporation in the state.

In our judgment, the act creating the railroad commission is not unconstitutional and void. That it may need amendments is most probable; indeed, an experiment so new and untried would be exceptional if it were perfect in its very inception. The difference between the power to pass a law and the power to adopt rules and regulations to carry into effect a law already passed, is apparent and strikingly great, and this we understand to be the distinction recognized by all the courts as the true rule in determining whether or not in such cases a legislative power is granted. The former would be unconstitutional, whilst the latter would not. 91 Ill. Rep., 357; Tilly vs. Savannah, Florida and Western Railroad Company, and cases (Circuit Court U. S. Southern District of Ga. Woods, J.) See pam. dec. Supreme Court of Georgia. September 1880; 94 U. S. Rep., 113, 155, 164.

2. The next question made by the record is, whether the act of October 14, 1879, violates the chartered rights of the stockholders of the Georgia Railroad & Banking Company, as contained in the 12th section of the act of incorporation. That clause is as follows:

"That the said Georgia Railroad Company shall at all times have the exclusive right of transportation or conveyance of persons, merchandise and produce, over the railroad and railroads to be by them constructed, while they see fit to exercise the exclusive right: Provided, that the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement, for every one hundred miles, and five cents per mile for every passenger: Provided always, that the said Company may, when they see fit, rent or farm out all or



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any part of their said exclusive right of transportation or conveyance of persons on the railroad or railroads, with the privilege to any individual, or individuals, or other company, and for such term as may be agreed upon, subject to the rates above mentioned." Acts of 1833, page 262.

It is well settled that the charters of incorporated companies granting exclusive privileges to the corporators are always to be strictly construed, and that whatever is not expressly given therein, or not necessarily implied therefrom, is withheld. In support of this rule of law, we quote from the case of Commonwealth vs. Erie and Northeast Railroad Company, 27 Pa. St. Rep., 339. Black, Chief Justice, in rendering the judgment of the court, said:

"That which a company is authorized to do by its act of incorporation it may do; beyond that all its acts are illegal. And the power must be given in plain words or by necessary implication. All powers not given in this direct and unmistakable manner are withheld. \* \* In such cases ingenuity has nothing to work with, since nothing can be either proved or disproved by logic or inferential reasoning. If you assert that a corporation had certain privileges, show us the words of the legislature conferring them. Failing in this, you must give up your claim, for nothing else can possibly avail you. A doubtful charter does not exist; because, whatever is doubtful is decisively certain against the corporation."

And again is the rule clearly and forcibly stated in the case of Fertilizer Company vs. Hyde Park, 97 U.S., 659. Swayne. Justice, said: "The rule of construction in this class of cases is that it shall be construed most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."

Guided by these authorities, let us see whether the 12th

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section of this charter can stand the test prescribed and give to the company what it claims. It was incorporated "to construct a rail or turnpike road," and after providing for its organization, conferring upon it the right to cross the public roads, and bridge the rivers and water courses, and giving it the right of way, etc., the act then proceeds to declare the special rights to be enjoyed. These were, that the company should "at all times have the exclusive right of transportation or conveyance of persons, merchandise and produce over the railroad and railroads to be by them constructed, while they see fit to exercise the exclusive right."

The exclusive right here granted was to be enjoyed only upon one condition, and that was, that the company should not charge more than fifty cents per hundred pounds per hundred miles on heavy freight, and five cents a mile for every passenger transported over the road. ture was dealing with the subject-matter of a public highway, and public highways had theretofore been open to the free use of all persons for travel, for the transportation of goods, and the conveyance of passengers, without the payment of tolls or charges. To deny the use of a public highway to the people at large, and give it to an incorporated company, for its exclusive use to convey passengers and freights, was deemed an extraordinary privilege; and this extraordinary privilege the legislature agreed to grant to this company, provided it would not charge more than the above rates. Or to put it in the form of contract, it was agreed by the state that this company might build the road, and so long as it carried freight and passengers as prescribed by its charter, it should not in anywise be used by the public, but by the company exclusively.

Under no reasonable construction of this charter can it be claimed that the state contracted with this company to guarantee to it the exclusive right to charge the full amount of the maximum rates, or indeed any rate, so long as it did not exceed them. It can only be construed to mean, that so long as the specified maximum of rates was not

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exceeded, the company or its lessee should have the exclusive right to carry freights and passengers over the road. This seems to us to be the unquestionable meaning of the words used, but even if this be doubtful, "whatever is doubtful is decisively certain against the corporation."

Besides, we hardly think it will be denied that the state has the power to regulate the rates of freight and passenger fare upon railroads, unless that right has been clearly parted with in granting their charters. Indeed, the words of the charter parting with this right by the state, must amount to a positive contract. In the case of the Charles River Bridge Co. vs. Warren Bridge Co. et al., 11 Pet., 544. C. J. Taney, in pronouncing the judgment of the court. said, that it was "necessary to show that the legislature contracted not to do the act of which complaint is made. The inquiry then is, does the charter contain such a contract on the part of the state? Is there any such stipulation to be found in the instrument? a contract on that subject can be gathered from the charter. it must be by implication, and cannot be found in the words. Can such an agreement be implied? The rule of construction before stated is an answer to the question. In charters of this description no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey. There are no words which import such a contract, and none can be implied." See also 49 Ga., 151; 50 Id., 620; 40 Eng. C. L., 298, 319; 42 Id., 496; 46 Id., 234-5.

Applying these rules of law to the charter under consideration, can it be said that there is a clear contract, either expressed or necessarily implied, that the company shall liave the absolute right to regulate its freights and fares and that the state will guarantee to them that right up to the maximum sums named in the charter? Such a contract cannot be found in the words, and "in charters of this description no rights are to be taken from the public, or

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given to a corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey."

The natural and proper construction of the words used is that the state stipulates, upon certain terms, not to interfere with the company's exclusive right of This was all. It is nowhere stipulated transportation. not to interfere with its rates. And, to bind the state, it must be shown that she contracted with the company that it would not thus interfere. Let us inquire, then, how does the act complained of deprive the railroad of its exclusive right to convey passengers or freight? By what paragraph therein is the road opened to the public? The answers are obvious: there is not a line to be found in it that deprives the corporators of the exclusive use of the road as against everybody. Hence the learned and able counsel for the railroad, to maintain their position, were compelled, in their construction, to insist that the word exclusive, in the 12th section of the charter, should be stricken out, or at least that no special significance should be given to it. Where, we ask, is there authority in any court, when construing the grant of chartered law and power to a corporation, to strike out or weaken the force of any word whatever, so as to enlarge the meaning, or cover what it would not cover if it remained therein? We know of no such authority, and none such has been, or can be, shown for this.

It is claimed by the company that the proviso makes the contract between it and the state. But before this can be construed into a contract such as is contended for, it would be necessary to insert words therein which are not used, and to make that a covenant in which no words of covenant appear. The construction contended for is, we think, unauthorized and violative of the rules as to what constitutes the usual office of a proviso. See 15 Peters, 423; 1 Barn. & Add., 99; Comyn's Dig., "Condition" (A 2), vol. 3; Coke on Littleton, 203 (b); Bouvier's L. Dic., "Proviso," 399.

Jones vs. Williams et al., commissioners.

It may not be out of place, in concluding this opinion. to say that, whilst we hold the act of October 14, 1879. constitutional, and the orders of the commissioners valid and binding, yet we are not to be understood as holding that their powers are unlimited or beyond legal control by the proper authorities of the state. On the contrary, we hold that the powers which have been conferred upon them are to be exercised within legal and constitutional limitations, and in such way as not to invade the legal and constitutional rights of others. If, therefore, the case made by the complainant against the commissioners, had shown a violation of the chartered rights of the company, it would have been the duty of this court, by proper order and decree, to have restrained and enjoined them from such vio-All grants of power are to be exercised only in conformity to the constitutions of the state and federal governments and the laws passed in pursuance thereof.

Judgment affirmed.

Hall, Justice, stated that he concurred in the judgment of the court, but could not concur with the other members thereof fully in construing section 12 of the charter of the Georgia Railroad, and would, therefore, concur dubitante as to the last point. He preferred not to dissent, as the case would, under the announcement of coursel, be carried to the Supreme Court of the United States, and he considered it better to have the questions reviewed on the judgment of a full bench.

# Jones vs. Williams et al., commissioners.

Where the tenants of a land owner placed a fence across a public road which ran through the land, but the owner did not claim the right to close the road, but exercised the privilege in subordination and not adversely, to the right of the public, the lapse of from the to seven years furnished no reason for enjoining the road commissioners from removing such obstruction.

#### Jones es. Williams et al., commissioners.

- 2. The abandonment of a public highway by mere non user does not work a forfeiture of the right to its use. An existing public road cannot be discontinued without the order of the ordinary or county commissioners, where there are such commissioners, based upon application and notice, and duly registered in the proper office.
- 3. The corporate authorities of the town of Rockmart, it seems, had no jurisdiction over this road. If they had, they took no action to discontinue it. The opening of a more direct road by them had no such effect, nor does it appear to have been so intended.

  April 3, 1883.

County Matters. Roads and Bridges. Easements. Prescription. Before Judge Branham. Polk Superior Court. August Term, 1882.

To the report contained in the decision, it is only necessary to add, in connection with the third division thereof, that part of the public road, the use of which had been discontinued, was within the town of Rockmart, and part without, and it appeared from the evidence that a new street had been opened by the corporate authorities, and thereupon the old road had ceased to be worked or used, and a fence had been put across it.

- A. T. WILLIAMS; BLANCE & HERBERT, by brief, for plaintiff in error.
  - I. F. THOMPSON; E. N. BROYLES, for defendant.

# HALL, Justice.

This bill sought an injunction and decree against the road commissioners to restrain them from removing obstructions from a public highway. It appears, from the facts in the record, that the road ran over lands to which the complainant held a title in fee, and had been used as a public road for forty years before any attempt had been made to close it up; that this use had ceased for some six or seven years; that there had been a fence across it about that length of time; that it was not obstructed by the

Jones rs. Williams et al., commissioners.

complainant, but, perhaps, by his tenants; that complainant had not directed the obstructions, and there had never been an order of the proper authorities to discontinue the use of the road.

On the hearing of the case, the complainant testified that "he had never ordered the old road closed, and never claimed the right to keep it closed, and if he had been urged to open it, would have made no objection until after the lane fence was removed. The lane fence was removed at no particular time, but was moved at piece meals. There was no order of court, so far as he knew, to close the road." When the testimony had closed, the defendants moved to dismiss this bill, because it was shown that the complainant did not hold the easement by adverse possession under claim of right, and that the mere abandonment of the road by non-user and failure to work it was not a forfeiture of the right of the public to its use as a highway.

This motion was sustained, and the bill dismissed.

- 1. So far from claiming the right set up in the bill to close this road, the evidence plainly shows that complain ant exercised it in subordination to, and not adversely to the right of the public, and that his suit for this reason was without any foundation to rest upon. Code, §2769, and cases cited thereunder.
- 2. That abandonment of a public highway by mere nonuser does not work a forfeiture of the right to its use, is evident from our legislation upon the subject. An existing public road cannot be discontinued without the order of the ordinary or county commissioners, where there are such commissioners, passed upon application and notice, and duly registered in the proper office. Code, \$8603 to 608 inclusive.
- 3. The corporate authorities of the town of Rockmart, it seems, had no jurisdiction over this road, and even if they had, they never took action to discontinue it; the opening of a more direct road by them, certainly had no

### Haynie rs. Watson.

such effect, nor does it appear that they thereby intended that it should. In any view that we are able to take, the court below did not err in dismissing the bill at the hearing. Judgment affirmed.

## HAYNIE vs. WATSON.

### [This case was argued at the last 'erm, and the decision reserve].]

1. There was no error in granting a new trial in this case.

2. Where a vendor offered to sell land for a specified price, but subsequently conveyed it to a trustee for a married woman, for a consideration expressed in the deed less than the price asked, and took the note of the husband of the cestui que trust for the difference, and this note was subsequently renewed by both husband and wife, such note was hardly for the purchase money of the land, so as to subject it as against a homestead therein.

February 20, 1883.

New Trial. Vendor and Purchaser. Trusts and Trustees. Homestead. Before Judge Pottle. Hart Superior Court. March Term, 1882.

Watson endeavored to purchase a lot of land from Havnie. They agreed upon \$1,500 as a price. Watson desired the land for his wife, but her trustee, Blake, had only \$1,380, and refused to give more for the land. Haynie then agreed that if Watson would give his note for the difference of \$120, he would make the deed to the trustee. This was agreed upon, the deed made for the expressed consideration of \$1,380, and Watson gave his note. Subsequently this was renewed, both Watson and his wife signing. Whether or not the first note contained a statement that it was for purchase money, the evidence was conflicting, the note itself having been destroyed; but the renewal note did state that it was for purchase money. Suit was brought, judgment obtained and a levy made on the land. Mrs. Watson interposed a claim, on the ground that she had had a homestead set apart in the property.

Smith, ordinary, for use, vs. Andrews, administrator, et al.

The jury found the property subject. A motion for a new trial was made and granted, and plaintiff excepted.

- A. G. McCurry, by brief, for plaintiff in error.
- J. H. SKELTON; WORLEY & CARLTON, by J. H. LUMPKIN, for defendant.

Jackson, Chief Justice.

This is the first grant of a new trial. In such a case the action of the judge is never closely scanned, and, unless the verdict be demanded, that action granting the new trial is always affirmed. It is not demanded in this case.

The judgment which sought to subject the land was hardly rendered on a note for purchase money; at least we shall not interfere with the court below, who wishes to review his ruling on the law of the case as applied to the facts reported above. See 65 Ga., 177; 60 Ib., 456; 40 Ib., 423, 428. If the consideration of the note was not purchase money, of course the claimant's homestead should have prevailed over the judgment on that note.

Judgment affirmed.

SMITH, ordinary, for use, vs. Andrews, administrator, et al.

[In this case, Hall, Justice, being disqualified, Judge Adams, of the Eastern Circuit was designated to preside in his stead.]

- The ordinary of a county having jurisdiction of an administration is incompetent as an attorney to bring suit on the bond of the administrator.
- 2. A suit so instituted by the ordinary as sole counsel was illegal, and could not be amended by adding the name of another attorney nunc pro tunc to the declaration.
- (a.) This case differs from that in 31 Ga., 337. What the law forbids to be done is widely different from that which is permissive or discretionary.

April 17; 1883.

Smith, ordinary, for use, re Andrews administrator, et oi.

## CRAWFORD, Justice.

Section 339 of the Code is in the following language: "No ordinary shall engage, directly or indirectly, in the practice of law in his own, or in the name of another, as a partner, open or silent, or otherwise, in any cause or proceeding in his own court, or in another court of which his own court has, or has had or may have jurisdiction."

The questions made by the record in this case arise out of the construction of the foregoing statute.

The ordinary of Crawford county being a practicing attorney at law, as such attorney brought suit upon an administrator's bond in the superior court for such county. At the trial term of the case, defendants, by their counsel, moved to dismiss the same upon the ground that it appeared and was admitted that R. D. Smith, Esq., who sued said case and signed said declaration as the sole attorney for the plaintiff, was, at the time of signing and the bringing of said suit, the plaintiff therein and the ordinary for the county of Crawford; and that the court of ordinary for said county had jurisdiction of the administration upon which said suit was brought. Pending the argument of this motion, plaintiff's counsel moved to amend by placing the signature of B. M. Davis, Esq., nunc pro tune, as plaintiff's attorney to said declaration. which, upon objection by defendant's counsel, was refused and disallowed, to which ruling plaintiff then and there excepted.

The court then sustained the motion of defendants' counsel and dismissed the plaintiff's suit, to which ruling the plaintiff again excepted.

The first question to be settled in this case is, whether the suit grew out of a cause or proceeding over which the court of ordinary has or has had or may have jurisdiction. If it did, then it is clear that it is such a suit as the ordinary, being an attorney, could not as such attorney bring. All estates administered upon must be by proceedings in

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the court of ordinary. There must have been, therefore, a petition in writing made to the ordinary for the appointment of this administrator; the very bond upon which suit in this case was brought must have been fixed in amount by him; the securities thereto must have been approved by him. The returns made by the administrator annually must have been made to and approved by him; the liability of the administrator under those returns so approved, is prima facie evidence against him; the whole proceeding, from his appointment to the final settlement of the administration, is one over which the ordinary has jurisdiction, even to the extent of trying the question of the amount due upon his accounts, if the wards, when of age, see fit to cite him to appear before the ordinary for such settlement.

Whilst it is true that the bond itself must be sued in the superior court, it is but the ultimate security for the liability appearing upon the books of the returns passed upon by the ordinary. It could, therefore, be scarcely claimed that he should sit in judgment in his own court on matters that create a *prima facie* liability against the administrator, and then sue the bond and make testimony from his own records to establish the amount due thereon.

Hence, it seems to us clear that this suit was illegally brought, and one which the ordinary, as an attorney, could not bring, even though brought in another court.

But it is said that the judge erred in refusing to allow counsel to amend by placing the name of B. M. Davis, Esq., nunc pro tunc, as plaintiff's attorney, to said declaration. To this we say that there was no legal suit in court none that the law could recognize, and therefore none that could be amended.

The suit, as brought, was one that the very plaintiff in the case was forbidden by law to bring. And shall it be claimed that when such a suit, so brought, is assailed upon the ground that the law forbade its being in the court at all in that way, that it may escape the prohibition upon

#### Barry & Co., rs. Usry et al.

it by a nunc pro tunc order? Whatsoever the law forbids to be done is widely different from that which is permissive or discretionary.

The suit was brought contrary to a positive law, and therefore void; no amendment can be made to a void suit. We are referred to the decision in the case of Tatum et al. vs. Allison, Anderson & Co., 31 Ga., 337, where it was held that a writ might be signed by an attorney in fact of the plaintiffs, and that if the signing be imperfect, it is curable, even under the act of 1818. We apprehend that if there had been a positive law forbidding a writ to be signed by an attorney in fact, as it is in this case that an attorney at law shall not bring such a suit, that the court in that case would have ruled as we do in this.

Judgment affirmed.

## \*BARRY & COMPANY vs. USRY et al.

1. A merchant always warrants that what he sells is reasonably suited to the use for which it is sold. Therefore, in a suit on a note given for chemicals to be used as a fertilizer, the plea being failure of consideration, there was no error in charging that "if the jury believed from the evidence that the fertilizer for which the note was given was properly and skillfully applied by defendants, that the soil was suitable and the seasons favorable, and that the fertilizer failed to produce any result as to an increase in the crops, then the fertilizer was not reasonably suited to the purpose for which it was sold, and you should find for the defendants," the converse of the proposition being fully given.

There was sufficient evidence to support the verdict. Judgment affirmed.

April 17, 1893.

JACKSON, Chief Justice.

[Barry & Company sued Usry et al. on a promissory note. Defendants pleaded the general issue and failure of consideration, in that the note was given for a fertilizer

<sup>\*</sup> No full reports or opinions are published in the following cases, under the provisions of the act of March 2, 1875. (R.)

Johnson, executrix, vs. Marietta and North Georgia Railroad.

purchased for the purpose of increasing the productiveness of defendants' land in 1878; that the lands were well prepared, the fertilizer properly applied, the crops well cultivated and the seasons tolerably propitious; but the fertilizers were worthless and of no benefit.

On the trial, plaintiffs introduced the notes sued on. Defendants introduced evidence in support of their plea of failure of consideration, which it is unnecessary to recite here. The jury found for the defendants. Plaintiffs moved for a new trial, because the verdict was contrary to law and evidence, and because the court charged as set out in the first head-note.

The motion was overruled, and plaintiffs excepted.]

# Johnson, executrix, vs. Marietta and North Georgia Railroad.

The fact that a judge of the superior court had formerly been a director of a railroad company, and was so at the time that an attorney rendered professional services to the company, did not disqualify him from presiding at the trial of a suit for such services, if at that time he had ceased to be a director, owned no stock, and was not otherwise interested. It is present, not past, interest which disqualifies a judge.

In no case will the first grant of a new trial be reversed, unless it
be made to appear that the discretion vested in the presiding judge
had been abused. Such is not the case here.

Judgment affirmed.

March 13, 1883.

Jackson, Chief Justice.

[Mrs. Johnson, executrix of Abda Johnson, deceased, sued the Marietta and North Georgia Railroad for \$1,000. alleged to be due for services rendered by the testator as attorney for the company. The jury found for the plaintiff \$600. Defendant moved for a new trial on the ground that the verdict was contrary to law and evidence. It was granted, and plaintiff excepted. One assignment of error was that the presiding judge had been a director in de-

### Phinizy & Clayton re. Porter d al.

fendant at the time the services which formed the basis of the suit were rendered, though he had since ceased to be such, and that he was not qualified to grant the new trial. The judge certifies that no objection was made on this ground before him.]

## PHINIZY & CLAYTON vs. PORTER et al.

Possession must be actual in order to protect land purchased from a defendant in f. fa. by a bona fide purchaser, after the lapse of four years. That the purchaser had the land surveyed, and finding the fence of a neighbor a little over his line, permitted it to remain there, on condition that he might join a fence thereto if he should desire to clear his land and build a fence, does not alone show such possession as will relieve the land from the lien of a judgment against the vendor. Code, \$3583; 55 Ga., 44, 224; 64 Ib., 46.

Judgment reversed.

March 18, 1883.

Jackson, Chief Justice.

[A fi. fa. was levied on land, and a claim was interposed. The claimant was a purchaser from the defendant in fi. fa. after the date of the judgment, but claimed to be relieved from the lien of the judgment by reason of four years' possession under §3583 of the Code. The evidence of possession relied on was that the purchaser had the land surveyed and found that a neighbor had run her fence a little over his line, in order to avoid a swamp; and he agreed with the neighbor's agent that her fence might remain where it was over the line, with the privilege reserved to him of joining it. The jury found the land not subject. Plaintiff moved for a new trial on the ground that the verdict was not supported by the evidence. The motion was overruled, and plaintiff excepted.]

Moreland rs. Troup County; City of Atlanta rs. Wilson.

## MORELAND vs. TROUP COUNTY.

The right to recover damages resulting from a failure of a county to keep its bridges in proper repair was not affected by the adoption of the constitution of 1877. Whether or not the restriction imposed by that instrument (art. 7, sec. 6, par. 2) on the taxing power of a county would prevent the plaintiff from realizing the amount of his demand, does not affect the right of recovery; nor does it furnish any ground of demurrer to the declaration.

Judgment reversed.

April 3, 1883.

## CRAWFORD, Justice.

[Moreland brought suit against the county of Troup to recover damages for an injury to him, alleged to have been sustained on account of the negligence of the county in not keeping one of the public bridges in repair. Defendant demurred to the declaration, on the ground that it showed on its face that the injury complained of had been sustained since the adoption of the constitution of 1877. The demurrer was sustained, and plaintiff excepted.]

# CITY OF ATLANTA vs. WILSON.

#### [Two justices presiding.]

- 1. A case was brought in the superior court, dismissed and re-brought in the city court of Atlanta; when called, a motion was made to dismiss because the costs in the superior court had not been paid; the jury found that they had been paid; a motion was made for a new trial, which was granted unless the plaintiff would pay a cortain sum of additional costs which the judge found to be due in the superior court; this was done; exception was taken thereto:
- Held, that the object of the law is to have the costs paid; they have been paid, and under the facts of the case a new trial is unnecessary on this ground.
- 2. This case has been before this court three times; the law of the case was settled by the decisions then announced; the charge d the court submitted the same to the jury fairly and fully, and new trial is not required. 59 Ga., 544; 60 Ib., 474; 63 Ib., 291.
- (a.) In illustrations by the court in his charge, allusions to what counsel has said, especially in a concluding argument, is bad practice, and has a tendency to indorse the concluding speech

#### Patillo ra Mayer & Glauber.

Under the facts of this case, however, and taking the entire charge together, a new trial is not necessary.

 The verdict has settled the questions of fact, the damages were not excessive, and nothing said by the court injured the defendant.
 Judgment affirmed.

August 27, 1883

## JACKSON, Chief Justice.

[To the report contained in the head-notes, it is only necessary to add that this case has been before the court three times before. See 59 Ga., 594; 60 Ib., 474; 63 Ib., 291; where it will be found reported. In connection with head-note 2 (a), it may be stated that the court, in charging as to what barriers might be necessary to protect passers from injury resulting from an embankment in a street, referred to the barriers described by counsel for plaintiff in the concluding argument.]

## PATILLO vs. MAYER & GLAUBER.

- 1. A person drew a draft on a firm, payable to himself or order, for an amount stated, "for supplies, etc., furnished me to make my crops, this to be an advance to me under my mortgage" of same date, waiving homestead and other exemptions. There was no acceptance of this, but the drawer and after him a third party signed their names across the face of the paper, and it was delivered to the drawees:
- Held, that it was in legal effect a promissory note, and could be declared on in the statutory form as such.
- 2. The effect of the signature of the third person on the face of the paper was to make him a surety for the principal debtor. The form of a contract is immaterial, provided the fact of suretyship exists; hence, an accommodation indorser is considered merely as a surety. Code, \$2151; 2 Ga., 159.
- This case having been apparently brought here for delay only, ten per cent. damages are awarded against the plaintiff in error. Judgment affirmed with damages.

March 20, 1883.

# HALL, Justice.

[Plaintiffs sued on the paper stated in the first headnote. On the trial, defendant moved for a non-suit, which was refused, and this was assigned as error.] Osborn vs. Osborn; Rider et al vs. Waters et al., executors-

#### OSBORN vs. OSBORN.

A condition precedent to issuing the writ of certiorari is that the party seeking it shall produce a certificate from the officer whose decision or judgment is the subject-matter of complaint that all costs which may have accrued on the trial below have been paid. This condition is not met by a certificate that the plaintiff in certiorari has paid "the court costs in said case." Code, \$14054, 3685.

Judgment affirmed.

March 18, 1883.

Jackson, Chief Justice.

[The judgment excepted to was the dismissal of a retiorari on the hearing, for want of a proper certificate as to costs. The only certificate was that the plaintiff in certiorari had paid "all court costs."]

## RIDER et al. vs. WATERS et al., executors.

Title by prescription was not shown by the defendants in this case, and a perfect title from the state having been shown by the plaintiffs, a verdict for the latter was not contrary to law or evidence. Code, §2679.

- (a.) Possession, to furnish a basis for a prescriptive title, must be public, continuous, exclusive, uninterrupted and peaceable. That a tramway or sluice boxes for the transfer of ores from an adjoining lot touched, or just passed through, one corner of the lot involved in suit, does not constitute such exclusive occupancy of that lot under claim of right as will ripen into a prescriptive title; age cially where such construction does not appear to have been used continuously, but was allowed to rot down and so remain a partition of the time.
- (b.) Besides there was conflict as to payment of taxes on the land in this case, and the credibility of witnesses was a question for the jury.

Judgment affirmed.

March 13, 1883.

JACKSON, Chief Justice.

Cited for plaintiffs in error: 58 Ga., 386; 16 Ib. Wi

#### Ragers w. Cheraker Iron and Rai way Company etc.

**57** B. 204; 62 B. 531; 65 B. 402; 63 B. 360; Cole. \$\$2650, 2651.

For defendants: 63 Ga., 360.

## ROGERS 24. CHEROKEE IRON AND RAILWAY COMPANY.

- Where in a motion for new trial the movant is allowed until a certain day, time or term to prepare and file the motion and approved brief of evidence, the word "until" includes such day, term or time, and if proper action be taken at that time, it is in season. 67 Ga., 765.
- 2. Where the respondent in the motion moved to dismiss it on the ground that the motion and brief of evidence were not approved and filed in time, but no point was made on the absence of a role nisi or waiver thereof, the point cannot be raised for the first time in this court, as a reason for reversing the refusal to dismiss the motion. 69 Ga., 729.
- (a.) Besides, counsel for respondent were served with the motion, were present at the hearing, and participated in the proceedings, and this was a waiver of the rule nist. 69 Ga., 782.
- This was the first grant of a new trial the evidence was conflicting, and there was no abuse of discretion in the judgment.
   Judgment affirmed.

April 17, 1883.

HALL, Justice.

# WIKLE, receiver, vs. SILVA et al.

- The custody of property by the receiver of the court is the custody
  of the court. One who dispossesses the receiver, therefore, of property consigned to him by the court, dispossesses the court, and of
  course becomes in contempt of court; and he may be punished
  for contempt, and the property may be restored.
- 2. In this case the question of possession by the receiver was contested; the affidavits were conflicting; the chancellor refused to grant an order for the restoration of the property in contest, thereby passing on contested facts; and we will not control his discretion, unless it be made clearly to appear that he has abused it.
- (a.) Title should not be tried on such a summary proceeding; possession alone is in issue.

#### Wimbish vs. The State of Georgia.

 In cases where the chancellor has discharged a rule nisi and ruled that the defendant was not in contempt, this court will still more reluctantly interfere.
 Judgment affirmed.

April 8, 1883.

JACKSON, Chief Justice.

## WIMBISH vs. THE STATE OF GEORGIA.

 The evidence of the guilt of the defendant in this case is overwhelming.

A demurrer to the indictment should have been in writing, and shown to have been so, before arraignment; otherwise its over ruling on that ground will be affirmed. Code, §4639; 22 Ga., 49. 503, 545, 546; 41 Ib., 484, 500; 60 Ib., 126. \*

- 3. One question in a criminal case being in regard to the location of a county line, so as to fix the venue, hearsay evidence is admissible. Lines between large tracts of country, as between counties, may be proved by hearsay, reputation or tradition. Vast numbers of people are interested and large interests at stake, and many will know and talk about the lines; what is said and what is handed down from father to son thus becomes evidence to be weighed by the jury; and a charge that such testimony could be considered by the jury, with the other facts and circumstances, to show where the line ran, was not error. Tyler on Boundaries, 296 and citations.
- (a.) As to private boundaries the extent of the rule is in question.

  Tyler on Boundaries, 296 et seq
- (b.) In this case no objection was made to the admission of testimon, by a witness that he had heard people state where the county line was; but error was assigned in the charge of the court thereon is follows: "If a witness swears positively to a matter, you may take that into consideration; also take into consideration his reasons why he knew where the county line was. County lines are irrequently a matter of, you might say, report among neighbors and friends as to where a county line or any other line is; and on the things hearsays are permitted in court. A man may say he was told where the line was, and he may say the crime was committed in one county or the other from that. All these circumstances are facts and all others the jury may take into consideration, and say from them whether they are satisfied beyond a reasonable dash that this man committed the crime in this county."
- 4. The same degree of evidence is necessary to establish the venue at

<sup>\*</sup>The demurrer was ore tenus, and it did not appear when it was made.

#### Nichols in Whelebel et al., Rollin in The State of Georgia

a criminal case as to prove the main ingredients of the crime, but no more.

(a.) In this case the judge charged that the venue must be established beyond a reasonable doubt, and gave the defendant the full benefit of that dectrine. The charge is full, able, clear and comprehensive, and is the law of the case.

Judgment affirmed.

March 27, 1883.

JACKSON, Chief Justice.

## NICHOLS rs. WHELCHEL et al.

- The record in this case is unsatisfactory; the testimony fails to show all the facts necessary to a proper adjudication of the rights of the parties, but it shows enough to require a new trial.
- (a.) The judgments under which a sale was made, by virtue of which claimant claims in this case, were rendered in cases commenced to enforce a mechanic's lien, but in what manner does not appear; nor is it apparent how a general judgment was obtained in a case begun by a seizure under a f. fa. issued on a mechanic's lien.
- 2. Where a judgment rendered in 1876 was in 1879 levied on certain land, to which a claim was interposed by one claiming title under a sheriff's deed made in 1874, the plaintiff in the last judgment attacking the former sale as void, it was error calculated to mislead the jury for the court to charge that, if the claimant had been in possession of the land levied on for four years and was a bona fide purchaser for a valuable consideration without notice of the plaintiff's judgment, the land would not be subject. The claimant, having bought two years before the date of the judgment, could not have had notice, and the jury may have been misled. Judgment reversed.

March 18, 1883.

CRAWFORD, Justice.

## ROLIN vs. THE STATE OF GEORGIA.

 A motion in arrest of judgment in a case of larceny from the house, predicated on the grounds that the indictment was so fatally defective that no legal judgment could be rendered thereon, that it did not charge the defendant with a violation of any penal law of this state, and that under it she should only have been sentenced for a misdemeanor, should specify the fatal defects in the indictSmith, ordinary, for use, vs. Andrews, administrator, et al.

The jury found the property subject. A motion for a new trial was made and granted, and plaintiff excepted.

- A. G. McCurry, by brief, for plaintiff in error.
- J. H. SKELTON; WORLEY & CARLTON, by J. H. LUMPKIN, for defendant.

JACKSON, Chief Justice.

This is the first grant of a new trial. In such a case the action of the judge is never closely scanned, and, unless the verdict be demanded, that action granting the new trial is always affirmed. It is not demanded in this case.

The judgment which sought to subject the land was hardly rendered on a note for purchase money; at least we shall not interfere with the court below, who wishes to review his ruling on the law of the case as applied to the facts reported above. See 65 Ga., 177; 60 Ib., 456; 40 Ib., 423, 428. If the consideration of the note was not purchase money, of course the claimant's homestead should have prevailed over the judgment on that note.

Judgment affirmed.

SMITH, ordinary, for use, vs. Andrews, administrator, et al.

[In this case, Hall, Justice, being disqualified, Judge Adams, of the Eastern Circuit was designated to preside in his stead.]

- The ordinary of a county having jurisdiction of an administration is incompetent as an attorney to bring suit on the bond of the administrator.
- 2. A suit so instituted by the ordinary as sole counsel was illegal, and could not be amended by adding the name of another attorney nunc pro tunc to the declaration.
- (a.) This case differs from that in 31 Ga., 337. What the law forbids to be done is widely different from that which is permissive or discretionary.

Smith, ordinary, for use, vs. Andrews administrator, et al.

## CRAWFORD, Justice.

Section 339 of the Code is in the following language: "No ordinary shall engage, directly or indirectly, in the practice of law in his own, or in the name of another, as a partner, open or silent, or otherwise, in any cause or proceeding in his own court, or in another court of which his own court has, or has had or may have jurisdiction."

The questions made by the record in this case arise out of the construction of the foregoing statute.

The ordinary of Crawford county being a practicing attorney at law, as such attorney brought suit upon an administrator's bond in the superior court for such At the trial term of the case, defendants, by their counsel, moved to dismiss the same upon the ground that it appeared and was admitted that R. D. Smith, Esq., who sued said case and signed said declaration as the sole attorney for the plaintiff, was, at the time of signing and the bringing of said suit, the plaintiff therein and the ordinary for the county of Crawford; and that the court of ordinary for said county had jurisdiction of the administration upon which said suit was brought. Pending the argument of this motion, plaintiff's counsel moved to amend by placing the signature of B. M. Davis, Esq., nunc pro tune, as plaintiff's attorney to said declaration, which, upon objection by defendant's counsel, was refused and disallowed, to which ruling plaintiff then and there excepted.

The court then sustained the motion of defendants' counsel and dismissed the plaintiff's suit, to which ruling the plaintiff again excepted.

The first question to be settled in this case is, whether the suit grew out of a cause or proceeding over which the court of ordinary has or has had or may have jurisdiction. If it did, then it is clear that it is such a suit as the ordinary, being an attorney, could not as such attorney bring. All estates administered upon must be by proceedings in Smith, ordinary, for use vs. Andrews, administrator, et al.

the court of ordinary. There must have been, therefore, a petition in writing made to the ordinary for the appointment of this administrator; the very bond upon which suit in this case was brought must have been fixed in amount by him; the securities thereto must have been approved by him. The returns made by the administrator annually must have been made to and approved by him; the liability of the administrator under those returns so approved, is prima facie evidence against him; the whole proceeding, from his appointment to the final settlement of the administration, is one over which the ordinary has jurisdiction, even to the extent of trying the question of the amount due upon his accounts, if the wards, when of age, see fit to cite him to appear before the ordinary for such settlement.

Whilst it is true that the bond itself must be sued in the superior court, it is but the ultimate security for the liability appearing upon the books of the returns passed upon by the ordinary. It could, therefore, be scarcely claimed that he should sit in judgment in his own court on matters that create a *prima facie* liability against the administrator, and then sue the bond and make testimony from his own records to establish the amount due thereon.

Hence, it seems to us clear that this suit was illegally brought, and one which the ordinary, as an attorney, could not bring, even though brought in another court.

But it is said that the judge erred in refusing to allow counsel to amend by placing the name of B. M. Davis, Esq., nunc pro tunc, as plaintiff's attorney, to said declaration. To this we say that there was no legal suit in court, none that the law could recognize, and therefore none that could be amended.

The suit, as brought, was one that the very plaintiff in the case was forbidden by law to bring. And shall it be claimed that when such a suit, so brought, is assailed upon the ground that the law forbade its being in the court at all in that way, that it may escape the prohibition upon

#### Barry & Co., vs. Usry et al.

it by a nunc pro tunc order? Whatsoever the law forbids to be done is widely different from that which is permissive or discretionary.

The suit was brought contrary to a positive law, and therefore void; no amendment can be made to a void suit. We are referred to the decision in the case of Tatum et al. vs. Allison, Anderson & Co., 31 Ga., 337, where it was held that a writ might be signed by an attorney in fact of the plaintiffs, and that if the signing be imperfect, it is curable, even under the act of 1818. We apprehend that if there had been a positive law forbidding a writ to be signed by an attorney in fact, as it is in this case that an attorney at law shall not bring such a suit, that the court in that case would have ruled as we do in this.

Judgment affirmed.

## \*BARRY & COMPANY vs. USRY et al.

- 1. A merchant always warrants that what he sells is reasonably suited to the use for which it is sold. Therefore, in a suit on a note given for chemicals to be used as a fertilizer, the plea being failure of consideration, there was no error in charging that "if the jury believed from the evidence that the fertilizer for which the note was given was properly and skillfully applied by defendants, that the soil was suitable and the seasons favorable, and that the fertilizer failed to produce any result as to an increase in the crops, then the fertilizer was not reasonably suited to the purpose for which it was sold, and you should find for the defendants," the converse of the proposition being fully given.
- There was sufficient evidence to support the verdict. Judgment affirmed.

April 17, 1898.

JACKSON, Chief Justice.

[Barry & Company sued Usry et al. on a promissory note. Defendants pleaded the general issue and failure of consideration, in that the note was given for a fertilizer

<sup>\*</sup> No full reports or opinions are published in the following cases, under the provisions of the act of March 2, 1875. (R.)

Johnson, executrix, vs. Marietta and North Georgia Railroad.

purchased for the purpose of increasing the productiveness of defendants' land in 1878; that the lands were well prepared, the fertilizer properly applied, the crops well cultivated and the seasons tolerably propitious; but the fertilizers were worthless and of no benefit.

On the trial, plaintiffs introduced the notes sued on. Defendants introduced evidence in support of their plea of failure of consideration, which it is unnecessary to recite here. The jury found for the defendants. Plaintiffs moved for a new trial, because the verdict was contrary to law and evidence, and because the court charged as set out in the first head-note.

The motion was overruled, and plaintiffs excepted.]

# Johnson, executrix, vs. Marietta and North Georgia Railroad.

The fact that a judge of the superior court had formerly been a director of a railroad company, and was so at the time that an attorney rendered professional services to the company, did not disqualify him from presiding at the trial of a suit for such services, if at that time he had ceased to be a director, owned no stock, and was not otherwise interested. It is present, not past, interest which disqualifies a judge.

In no case will the first grant of a new trial be reversed, unless it
be made to appear that the discretion vested in the presiding judge
had been abused. Such is not the case here.

Judgment affirmed.

March 13, 1883.

# JACKSON, Chief Justice.

[Mrs. Johnson, executrix of Abda Johnson, deceased, sued the Marietta and North Georgia Railroad for \$1,000 alleged to be due for services rendered by the testator attorney for the company. The jury found for the plantiff \$600. Defendant moved for a new trial on the ground that the verdict was contrary to law and evidence. It was granted, and plaintiff excepted. One assignment of error was that the presiding judge had been a director in de-

#### Phinizy & Clayton vs. Porter et al.

fendant at the time the services which formed the basis of the suit were rendered, though he had since ceased to be such, and that he was not qualified to grant the new trial. The judge certifies that no objection was made on this ground before him.]

## PHINIZY & CLAYTON vs. PORTER et al.

Possession must be actual in order to protect land purchased from a defendant in f. fa. by a bona fide purchaser, after the lapse of four years. That the purchaser had the land surveyed, and finding the fence of a neighbor a little over his line, permitted it to remain there, on condition that he might join a fence thereto if he should desire to clear his land and build a fence, does not alone show such possession as will relieve the land from the lien of a judgment against the vendor. Code, \$3583; 55 Ga., 44, 224; 64 Ib.. 46.

Judgment reversed.

March 18, 1883.

# JACKSON, Chief Justice.

[A fi. fa. was levied on land, and a claim was interposed. The claimant was a purchaser from the defendant in fi. fa. after the date of the judgment, but claimed to be relieved from the lien of the judgment by reason of four years' possession under §3583 of the Code. The evidence of possession relied on was that the purchaser had the land surveyed and found that a neighbor had run her fence a little over his line, in order to avoid a swamp; and he agreed with the neighbor's agent that her fence might remain where it was over the line, with the privilege reserved to him of joining it. The jury found the land not subject. Plaintiff moved for a new trial on the ground that the verdict was not supported by the evidence. The motion was overruled, and plaintiff excepted.]

Moreland vs. Troup County; City of Atlanta vs. Wilson.

## Moreland vs. Troup County.

The right to recover damages resulting from a failure of a county to keep its bridges in proper repair was not affected by the adoption of the constitution of 1877. Whether or not the restriction imposed by that instrument (art. 7, sec. 6, par. 2) on the taxing power of a county would prevent the plaintiff from realizing the amount of his demand, does not affect the right of recovery; nor does it furnish any ground of demurrer to the declaration.

Judgment reversed.

April 3, 1883.

CRAWFORD, Justice.

[Moreland brought suit against the county of Troup to recover damages for an injury to him, alleged to have been sustained on account of the negligence of the county in not keeping one of the public bridges in repair. Defendant demurred to the declaration, on the ground that it showed on its face that the injury complained of had been sustained since the adoption of the constitution of 1877. The demurrer was sustained, and plaintiff excepted.]

# CITY OF ATLANTA vs. WILSON.

#### [Two justices presiding.]

- 1. A case was brought in the superior court, dismissed and re-brought in the city court of Atlanta; when called, a motion was made to dismiss because the costs in the superior court had not been paid; the jury found that they had been paid; a motion was made for a new trial, which was granted unless the plaintiff would pay a certain sum of additional costs which the judge found to be due in the superior court; this was done; exception was taken thereto:
- Held, that the object of the law is to have the costs paid; they have been paid, and under the facts of the case a new trial is unnecessary on this ground.
- 2. This case has been before this court three times; the law of the case was settled by the decisions then announced; the charge of the court submitted the same to the jury fairly and fully, and a new trial is not required. 59 Ga., 544; 60 Ib., 474; 63 Ib., 291.
- (a.) In illustrations by the court in his charge, allusions to what counsel has said, especially in a concluding argument, is bed practice, and has a tendency to indorse the concluding speech.

#### Patillo rs. Mayer & Glauber.

Under the facts of this case, however, and taking the entire charge together, a new trial is not necessary.

 The verdict has settled the questions of fact, the damages were not excessive, and nothing said by the court injured the defendant.
 Judgment affirmed.

August 27, 1883

## JACKSON, Chief Justice.

[To the report contained in the head-notes, it is only necessary to add that this case has been before the court three times before. See 59 Ga., 594; 60 Ib., 474; 63 Ib., 291; where it will be found reported. In connection with head-note 2 (a), it may be stated that the court, in charging as to what barriers might be necessary to protect passers from injury resulting from an embankment in a street, referred to the barriers described by counsel for plaintiff in the concluding argument.]

## PATILLO vs. MAYER & GLAUBER.

1. A person drew a draft on a firm, payable to himself or order, for an amount stated, "for supplies, etc., furnished me to make my crops, this to be an advance to me under my mortgage" of same date, waiving homestead and other exemptions. There was no acceptance of this, but the drawer and after him a third party signed their names across the face of the paper, and it was delivered to the drawees:

Held, that it was in legal effect a promissory note, and could be declared on in the statutory form as such.

2. The effect of the signature of the third person on the face of the paper was to make him a surety for the principal debtor. The form of a contract is immaterial, provided the fact of suretyship exists; hence, an accommodation indorser is considered merely as a surety. Code, §2151; 2 Ga., 159.

 This case having been apparently brought here for delay only, ten per cent. damages are awarded against the plaintiff in error.
 Judgment affirmed with damages.

March 20, 1883.

# HALL, Justice.

[Plaintiffs sued on the paper stated in the first headnote. On the trial, defendant moved for a non-suit, which was refused, and this was assigned as error.] Akerman, executrix, vs. Neel, receiver; Platen, in re; etc.

## AKERMAN, executrix, vs. NEEL, receiver.

Proper service of the bill of exceptions must appear from an entry in dorsed upon or annexed thereto. When there is no entry whatever indorsed upon or attached to the bill of exceptions showing service, parol statements cannot be heard in this court for the purpose of showing that service was perfected. Code, \$4259; 44 Ga., 652; 45 Ib., 316; 59 Ib., 666; 63 Ib., 626.

Writ of error dismissed.

writ or error dismin

March 81, 1883.

# PLATEN, in re.

At the September term, 1880, an application was made for a mandamus nisi calling upon the judge of the Eastern circuit to show cause why he should not certify a bill of exceptions, and the same was refused. At the February term, 1883, the movant made an application to this court in the general form of a bill of review to have the judgment then rendered reviewed:

Held, that the application must be denied.

May 1, 1883.

# Johnson, next friend, vs. CITY OF ATLANTA.

After the bill of exceptions has been filed in office, it cannot be withdrawn for the purpose of perfecting service, and if it be withdrawn and an acknowledgment of service be entered thereon, it is an alteration of the bill of exceptions. Therefore, where it appears that a bill of exceptions was filed on January 18, and service was acknowledged on January 22, the writ of error must be dismissed.

April 27, 1882.

# CONTINENTAL NATIONAL BANK et al. vs. Folsom.

A case was brought in the city court of Atlanta, and pleas to the jurisdiction filed. When the case was called, counsel for plaintiff moved to dismiss such pleas; the motion was sustained, and the pleas dismissed. Plaintiff then amended his declaration, and defendant's counsel moved for a continuance, which was granted and the case is still pending in the court below. Defendant's counsel then presented a bill of exceptions, assigning error on the

#### Sproull et al. w. Walker et al; Head vs. Bridges et al

striking of the pleas. The judge declined to sign this bill of exceptions, and a mandamus nisi is asked against him:

Held, that such mandamus must be refused. The case has not been finally disposed of, nor would it have been finally disposed of had the court merely declined to strike the pleas, that being the ruling sought by defendant.

Application denied.

May 1, 1883.

## SPROULL et al. vs. WALKER et al.

The brief of evidence accompanying a motion for new trial must be approved by the presiding judge; and where the only exception is to the overruling of a motion for new trial based on the evidence and on charges and refusals to charge, in the absence of an approved brief, the writ of error will be dismissed.

(a.) Where the presiding judge approved a brief of evidence "subject to the correction of any error that may be found therein before the final hearing of the motion for new trial," and no further approval appears, the writ of error will be dismissed, although the bill of exceptions recites that "A brief of evidence introduced on said trial was duly approved by the court and filed in the clerk's office with said motion for new trial, and is a part of the record of the cause, to which said brief reference is hereby had."

Writ of error dismissed.

February 27, 1882.

# HEAD vs. BRIDGES et al.

This case was called and continued on account of sickness of one of counsel for plaintiff in error. On the next day, counsel for defendants in error moved the court to reconsider its action, and set the case for a later day during the same term. The motion alleged that a common law suit and the administration of an estate was held in suspense by injunction until the decision of the Supreme Court could be had; that the case had been carried forward by continuances since the August term, 1882, of Monroe superior court; that at the last term of the Supreme Court a diminution of the record had been suggested, and a continuance resulted, and that, on an examination of the record, this suggestion proved to be a mistake. The motion was accompanied by an agreement of counsel for plaintiff in error that the case might be heard at the heel of the Augusta circuit, provided the counsel who was ill should then be able to appear:

Warnock vs. Kilpatrick, administrator; Kleckley vs. Armstrong: etc.

Held, that after a case has been regularly called and continued for the term, it cannot be reinstated on the docket and set by agreement. Motion denied.

April 3, 1898.

# WARNOCK vs. KILPATRICK, administrator.

- 1. Where an exception is taken to the refusal of a new trial, a brief of the oral and copy of the written testimony must appear in the record, or be incorporated in or exhibited to the bill of exceptions, properly authenticated. It is a copy of the brief of evidence used in the court below which should be brought to this court—not the original. Where the evidence has been brought to this court as an exhibit to the bill of exceptions, and on inspection it is apparent that the original records of the court below have been so used, instead of copies thereof, the writ of error must be dismissed.
- 2. Where one ground of a motion for new trial was newly discovered evidence, and affidavits were used in connection with the hearing of the motion, if the case be brought to this court, such affidavits should be included in the bill of exceptions, and do not form part of the record. A failure to include in the bill of exceptions affidavit used on the hearing of the motion, will work a dismissal of the writ of error.\*

Writ of error dismissed.

April 12 1883.

# KLECKLEY vs. ARMSTRONG.

A bill of exceptions filed to the refusal of a new trial, recited that "a brief of the evidence had been agreed on by counsel and approved by the court and ordered of file." The record contained to brief of evidence:

Held, that the writ of error must be dismissed.

March 16, 1883.

# HARRELL vs. TIFT.

- A case cannot be brought to this court for adjudication by direct exception solely to a ruling made pendente lite. There must be a valid exception to some final ruling of the court below, on which to predicate other assignments of error
- (a.) A bill of exceptions stated that the defendant below offered a certain document in evidence, which was rejected, on objection by

<sup>\*</sup>Since modified. See Crockett vs. McLendon (February Term, 1884.) (B.)

Osborn vs. Hale, administrator; Head vs. Sticher; etc.

the plaintiff, "to which ruling and decision of the court in refusing to admit said evidence and in sustaining the objection of plaintiff, defendant excepts. The defendant having offered no other testimony, the case was submitted to the jury. The jury retired and returned a verdict for the plaintiff, and now within the past thirty days from the close of the term of the court aforesaid, the defendant tenders this, his bill of exceptions," etc:

Held, that there was no proper assignment of error.

Writ of error dismissed.

March 13, 1883.

# Osborn vs. HALE, ådministrator.

This case was called, and dismissed for want of representation. Later in the same day abstracts and briefs of counsel for plaintiff in error reached the clerk by mail. On the next day such counsel appeared and made affidavit that he was detained by the sickness of his paternal grandmother, and that he had mailed his abstracts and briefs on the evening before the case was called in time to have reached the clerk, but they had not done so:

Held, that the case cannot be reinstated. Due diligence on the part of counsel was not exercised, and the Providential cause was not the sole cause of the dismissal.

Motion denied.

April 3, 1888.

#### HEAD VS. STICHER.

Where the case is brought to this court on exception to the refusal of a new trial (the grounds of the motion being the admission and rejection of evidence and that the verdict was contrary to evidence), and there is no approved brief of evidence, the writ of error must be dismissed.

March 30, 1883.

## OSBORN vs. THE STATE OF GEORGIA.

Where, upon the call of a criminal case, counsel for plaintiff in error stated in his place that his client had escaped, and remained without the jurisdiction of the court, the writ of error was dismissed.

March 8, 1868,



# CASES ARGUED AND DETERMINED

IN THE

# Supreme Court of Georgia,

## AT ATLANTA.

## SEPTEMBER TERM, 1883.

Present—JAMES JACKSON, .			CHIEF JUSTI	CE
SAMUEL HALL,			ASSOCIATE "	•
M. H. BLANDFORD.			"	•

# Woodbridge vs. Woodbridge, guardian, et al.

- 1. When an estate is to be kept together for a longer time than twelve months, and there are no debts to pay, the widow, or widow and minor children, or minor children, as the case may be, are entitled to a continuance of the year's support. Section 2572 of the Code must be construed together with section 2571; and, so construed, it was not intended to deprive the family of a year's support in case there should not be both a widow and minor children.
- 2. Where an estate was to be kept together for more than a year, and the widow applied for a continuance of the year's support, that she failed to allege that there were no debts to be paid did not render the petition demurrable. The existence of debts which would prevent the granting of a continuance of the support, was matter proper for defence against the application.

December 21, 1888.

Year's Support. Before Judge Adams. Chatham Superior Court. March Term, 1883.

Reported in the decision.

W. D. HARDEN; GEO. A. MERCER, for plaintiff in error.

Woodbridge vs. Woodbridge, guardian, et al.

CHISHOLM & ERWIN; GARRARD & MELDRIM, for defendants.

# Blandford, Justice.

The plaintiff in error, as the widow of Wylly Woodbridge, applied to the ordinary for a twelve months' support for herself out of the estate of her deceased husband; she alleged that the estate had been kept together for three years; she also asked for an allowance for each year the estate had been so kept together. She showed by her petition that there were no minor children, and did not allege that there were no debts to be paid. An appeal was taken from the judgment of the ordinary to the superior The defendants demurred to the petition, and the court below sustained the demurrer to all of said petition, except a twelve months' support for one year, and dismissed the same as to the second and third years. The plaintiff excepts to this ruling, and now here assigns the same for error.

1. It is contended by defendant in error that, under the act of 1865 and 1866, p. 31, Code §2572, unless there be a widow and minor children, the widow, where there are no minor children, or the minor children where there is no widow, is and are not entitled to the benefits of the provisions in this statute; that is, the widow alone, when there are no minor children, or the minor children when there is no widow, is and are not entitled to be supported out of the estate of the deceased husband or father for a longer period than twelve months, and not to a year's support for each year the estate may be kept together, as provided in this section of the Code. This section must be construed with reference to other statutes and sections of the Code upon the subject of year's support for the family of a deceased person. The title of the act of 1865-6, which has been codified under section 2572, is to add an additional clause to §2531 of the Code, which is now §2571. In §2571 of the Code it is declared that, among the neces-

#### Woodbridge vs. Wood bridge, guardian, et al.

sary expenses of administration to be preferred above all other debts, is a provision for the support of the family to be ascertained, etc., and it is therein provided: "Upon the death of any person \* \* \* leaving a widow, or a widow and minor child or children, or minor child or children on ly, it shall be the duty of the ordinary," etc. The 2572d section being but an amendment to §2571, which embraces the acts of 1838, Cobb's Digest, p. 296; act 1850, Id., 297; acts of 1853-4, p. 34; acts of 1855-6, 148; acts of 1860, p. 33; 1862 and 1863, p. 30; acts of 1866—we are satisfied that the words "widow and minor children" used in §2572, means widow or a widow and minor child or children, as used in §2571 of the Code. To give the section the construction contended for by counsel, would be to deny the helpless minor children of a deceased person. who had not only lost their father but their mother also. the benefits of this act of 1865 and 1866, the policy of the law being to make provision for the support of the families of deceased persons while their estates are being kept together, whether such families are composed of a widow only, or a widow and minor child or children.

2. It is also urged that, inasmuch as the plaintiff failed to allege in her petition that there were no debts to be paid by the estate of her deceased husband, the courts did right to sustain the demurrer. We do not think so. If there were debts to be paid, and if an allowance to the widow for her support for a longer time than twelve months should interfere with and prevent the payment of such debts, then this is a matter of defence which any creditor of the estate might make; or probably the administrator might also urge this defence; but if the estate, under the facts, should prove sufficient to pay off the debts and also provide a reasonable support for the widow during the time the same may be kept together, then the widow is entitled to such allowance. Whether the estate has been kept together or not, or whether there has been a distri-

#### Freeman vs The State of Georgia

bution of this estate, depends upon the facts to be determined by the jury on another trial. The judgment of the court below is reversed, upon the ground that the court erred in sustaining the demurrer to plaintiff's petition.

Judgment reversed.

## FREEMAN vs. THE STATE OF GEORGIA.

1. The charge in this case, as a whole, was full and fair, and covered every possible theory of the defence set up.

- 2. On a trial of a defendant for murder, it is the duty of the court to give to the jury the definition of each grade of homicide, and also the law of justifiable homicide, provided the testimony will authorize it; but where there is no evidence whatever on which the jury could base a verdict finding defendant guilty of involuntary manslaughter, a failure to charge on that subject is not error.
- (a.) The evidence shows a plain case of murder.
- (b.) Every person is presumed to intend the natural and necessary consequences of his acts.
- Although there may be a mutual intention and agreement to fight, yet if one of the disputants kill the other with malice, it is murder.
- (a.) There was no evidence on which to base a charge as to a mutual intention or agreement to fight, and such a charge should have been refused.
- There was no error in charging that the presumption of innocence remained with the defendant until overcome by evidence showing his guilt beyond a reasonable doubt.
   November 13, 1883.

Criminal Law. Charge of Court. New Trial. Before Judge Branham. Floyd Superior Court. March Term. 1883.

Reported in the decision.

WRIGHT, MEYERHARDT & WRIGHT, for plaintiff in error.

J. I. WRIGHT, solicitor general; T. W. ALEXANDER, for the state.

#### Freeman vs. The State of Georgia.

# HALL, Justice.

The prisoner and deceased, confined in the chain-gang of Floyd county, were engaged in working the road, the latter digging up dirt with a pick, and the former throwing it into a cart with a shovel, when an altercation arose. The prisoner accused the deceased of being in his way; alleged that this was frequent. The deceased repelled the accusation, using, according to some of the witnesses for the defence, coarse and vulgar language, and threatening to stick his pick in the rumps of some of his fellow prisoners. made no demonstration to that end; got back three or four feet out of the prisoner's way, and went on with his work. At this point, the prisoner struck him on the temple with the spade and felled him to the earth, and after he was down, immediately repeated the blow with the blade of the spade, which struck him near the top of the head. He died almost instantly from the wounds, each of which was shown, by the surgeon who made the examination, to have been mortal.

Under this testimony and the charge of the court, the jury found the prisoner guilty of murder, and he was sentenced to death. A motion was made for a new trial, and was refused by Judge Branham, who presided at the hearing of the same, the case having been tried by Judge Stewart.

Besides the usual grounds of the motion for a new trial, error was alleged to have been committed in the charge given to the jury,

- (1.) "Because the court failed and neglected to give in charge the law concerning involuntary manslaughter, thereby excluding from the consideration of the jury all the evidence that might have shown, or tended to show, that defendant was guilty of that offence, and was not guilty of murder."
  - (2.) In charging that, although the parties had a mutual

#### Freeman vs. The State of Georgia.

intention and agreement to fight, yet, if the killing was done with malice, it would be murder.\*

(3.) In charging, when the defendant filed the plea of not guilty, he was presumed to be innocent, a presumption which remained and continued with him through the case, unless it should be overcome by evidence. If the evidence failed to overcome such presumption and to satisfy the jury, beyond a reasonable doubt, that he was guilty, they should not convict; but if it showed him guilty of murder or manslaughter, they would find him guilty of the offence shown; but otherwise, not guilty at all.

The error assigned on this charge is that the last sentence is "too strong," and tended "to mislead the jury as to their duty to find the defendant guilty of murder or manslaughter;" by which we understand that it withdrew from their consideration any circumstances in evidence which would have authorized them to find a verdict convicting the defendant of involuntary manslaughter.

Neither of these grounds is verified by the judge who presided at the trial, and from his charge, which was written out at length, filed in the case and comes up as a part of the record, the two last grounds of the motion require correction to make them conform precisely to what was charged.

1, 2. The charge, as a whole, was full and fair and covered every possible theory of the defence set up. No right to

<sup>&</sup>quot;The language of the charge was as follows: "Now, gentlemen of the jury, these parties met together and an altercation occurred, and there was a mutual agreement and intention and purpose to fight, and one slew the other—for instance if they met together,—it is for you to say if they were working together, and mose and they agreed mutually to fight, if one had a shovel and the other a put we axe or any other instrument, and one was killed, it would either be murder of manislaughter, depending upon whether there was malice or not. If the killist was done under a sudden impulse of passion, it would be manislaughter, although they had a mutual intention and agreement to fight; but if a killing occurred, all if the killing was done with malice, it would be murder. If you believe that the parties had a mutual agreement to fight, and under a sudden heat of passion the defendant killed the deceased, he would be guilty of manislaughter; but if you'll leve he did it with deliberation and malice, it would be murder." The other charge is substantially stated in the next ground of error. (R)

#### Freeman rs. The State of Georgia.

which the defendant was entitled, was withheld; justice was meted out to him liberally and mercifully. The evidence made a very plain case of murder. There is nothing in the evidence which would authorize the jury to conclude that the prisoner killed the deceased without any intention to do so, or to show that the killing was involuntary; and even if it could be inferred, from the facts in evidence, that it was not the purpose of the defendant to kill, yet it happened in the commission of an unlawful act, which, in its consequences, naturally tended to destroy life, if indeed it was not a felonious assault, which would have subjected the party to imprisonment in the penitentiary in case death had not ensued, in either of which events it was murder under the law. Code, §4337.

Persons are presumed to intend the natural and necessary consequences of their acts. Here was an assault with a weapon likely to produce death, without any legal excuse or necessity for making it. It was murderous and persistent. After the deceased had received one mortal blow, another was given. A command to desist from the second blow was unheeded or disregarded. This persistence indicates the original wicked purpose too plainly to leave room for doubt.

The court did not err in refusing to submit to the jury the law as to involuntary manslaughter. There was no aspect of the evidence that made it applicable to the case. In Teal's case, 22 Ga., 75, 76, 83, 84, the law upon this question was thus laid down: "On a trial of a defendant for murder, it is the duty of the court to give to the jury the definition of each grade of homicide, as regulated by the penal Code; and also of justifiable homicide, provided the testimony will authorize it. If it be apparent, however, that the defendant is guilty of murder or voluntary manslaughter, or is not guilty, it is not error in the court so to charge." Lumpkin, J., delivering the opinion, said: "Error is assigned because the court did not charge the jury as to involuntary manslaughter. Is there a particle of proof to

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authorize such a charge? In Davis vs. The State, 10 Ga., 101, citing the previous case of Holder vs. The State, 5 Ga.. 441, this court did say that, in view of the facts disclosed by the record, "the court below ought to have given to the jury the definition of murder, voluntary manslaughter and the two grades of involuntary manslaughter, and also the definition of justifiable homicide, and left it to them to find under which definition it fell, and not to have instructed the jury that they must find the defendant guilty of murder, voluntary manslaughter, or not guilty. Could we say the same thing here in view of the facts disclosed It was, then, as the court in this record. stated, either murder or voluntary manslaughter, or justifiable homicide. And so the jury was obliged to find. And such was the ruling of this court in Boud vs. The We hold that the charge should State, 17 Ga., 193. apply to the case by the pleadings and the proof; and that, in just such a case as this, to charge the jury as to the crime of involuntary manslaughter would have been as inapplicable to the case as to have instructed them as to the law of arson or robbery." Dozier vs. The State. 26 Ga., 156; Choice vs. The State, 31 Ga., 424; Washington vs. The State, 36 Ga., 222; Hill vs. The State, 41 Ib., 485. 504, 505; Brown vs. The State, 25 Ib., 200, 215, 216; Durham vs. The State, February term 1883, in MS.: Jones' case, 65 Ib., 148; Wynne's case, 56 Ib., 113; O'Shield's. 55 Ib., 697; Brassel's case, 64 Ib., 319; Hoop er's case, 52 Ib., 607, 611.

3. The defendant's counsel requested the court to charge the law applicable to cases of mutual intention or agreement to fight, which he did. He should have declined to charge upon this subject; there was no evidence upon which such a charge could have been based. Thompsone case,  $55 \, Ga.$ , 48, 50. The charge given, that if the killing, in cases of mutual agreement to fight, was done with malice, it was murder, was not error, even under the ruling in Gann's case,  $30 \, Ga.$ , 67, 72, 73.

#### Banks we Hunt et al.

4. What possible error there was in charging the jury as to the presumption of the defendant's innocence until the presumption was overcome by proof showing his guilt, beyond a reasonable doubt, we are unable to perceive.

Judgment affirmed.

## BANKS vs. HUNT et al.

Where, in an attachment case, a garnishment was served and an answer filed, the plaintiff might traverse the same at the term when it was made; but this is not imperatively required, and he could traverse the answer at a subsequent term before an order had been taken discharging the garnishee.

(a.) This differs from a traverse of the ground of an attachment. The latter is a dilatory plea or a plea in abatement, and must be filed at the first term.

- (b.) The bare fact of answering and admitting indebtedness or effects, does not discharge the garnishee. He should pay the money into court or deliver the effects to the sheriff, to entitle him to a discharge; and these facts should clearly appear by the proceedings in the case. When this is done in open court, and his discharge moved for, if the plaintiff is dissatisfied with the answer, he may traverse it.
- (c.) It will not avail the garnishee that the fund which he admits having may not be subject to the garnishment because of being daily wages due to the defendant as a mechanic. When the money is paid into court, the defendant may claim his exemption or waive his right thereto; and the plaintiff has the right to contest the fact that the fund arises from such source.\*

O. tober 9, 1898.

Garnishment. Practice in Superior Court. Debtor and Creditor. Wages. Before Judge Willis. Muscogee Superior Court. May Term, 1883.

Banks sued out an attachment against Hunt, November 18, 1881, which was executed by service of summons of garnishment on Tilman, the same day. The declaration in attachment was filed December 5, 1881, in the usual

<sup>\*</sup>Compare Pioneer Co-operative Co. vs. Eagle, etc. M'fing Co., 67 Ga., 26; Smith, constable, vs. Johnston, (Sept.mber Term, 1883.)

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form, returnable to the May term, 1882, of Muscogee; perior court. At that term Tilman filed his answer: mitting indebtedness, but showing that it was for da wages due defendant, and that besides this he was indebted otherwise and had no other property or effe belonging to him. At the November term, 1882, bef judgment was taken against defendant in attachme plaintiff in attachment traversed the answer, denying truth, alleging indebtedness and that it was not exempt daily wages. An issue was formed on the answer traverse, which came on for a hearing at the May to 1883; on motion of counsel for garnishee, the trave was stricken, on the ground that it was not filed until the term of court at which the answer was made. tiff in attachment excepted.

J. M. Russell, for plaintiff in error.

McNeill & Levy, for defendants.

HALL, Justice.

The question made by this record is, whether the answer of a garnishee under an attachment can be traversed at a term of the court subsequent to that at which his answer was made, and before an order has been taken discharging The answer may be put in at the term of the court him. at which he is required to appear, but if he fails to appear at that term and make answer, the case stands continued until the next term, when, if he again fails to answer, the plaintiff may, on motion, have judgment against him for the amount of the judgment he may have obtained against the defendant in the attachment, or so much thereof as may remain unpaid at the time the judgment is rendered against the garnishee, and the court may continue the case until final judgment is rendered against the defendant. Code, §3304. This would seem to authorize judgment to be rendered against the defendant in attachment before

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#### Banks vs. Hunt et al.

judgment goes against the garnishee. This order of proceeding has been sanctioned by this court, though it refused to interfere with the practice that prevailed in one of the circuits of the state, which required the issue on the traverse of the garnishee's answer to be tried before the suit against the principal debtor was tried. Wilson vs. The Bank of Louisiana, 55 Ga., 98. That the garnishee's answer is in time, if made on the first day of the second term after service of the summons, has been expressly decided in cases of attachment. 60 Ga., 554. If the plaintiff is satisfied with the answer, judgment may be entered against the garnishee for the indebtedness admitted, and if effects are returned, they must be delivered to the sheriff and disposed of by him, under order of the court. §3405. But if the plaintiff is not content with the answer of the garnishee, he may, at the term of the court to which the return is made, traverse the same, and the issue formed upon such traverse shall be tried at the same term, unless. cause is shown for a continuance. Ib., §3406. It is insisted that this statute imperatively demands that the traverse shall be made and the issue formed thereby shall be tried at the term of the court to which the garnishee's answer is made, and not thereafter, and if this is not done, the plaintiff in attachment is bound by the answer; and this is likened to a traverse by the defendant of the grounds upon which the attachment issues, which must always be filed at the term to which the attachment is returnable, and not thereafter, (Code, 3312), and also to the term of the court at which the declaration in the attachment must be filed. The analogy between these cases and the Code, §3308. one under consideration, if it exist at all, is very incomplete and remote. The traverse of the ground upon which the attachment issues is an objection to the pleading; more precisely stated, "it is a plea to the writ," (56 Ga., 375), and is certainly a dilatory plea, or plea in abatement, which must always be filed at the first term. Code, \$3464. So, in the other case, an attachment can no more proceed

#### Banks vs. Hust et al.

to judgment without a declaration filed on it at the term of the court to which it is returnable, than could an ordinary suit unless the declaration had been filed twenty days before the term to which the suit was made returnable. The application of either of these rules to the traverse of a garnishee's answer is not very apparent; that goes to the very merits of the action, and may be filed at any time during the pendency of the suit, like any other plea to the merits, which has been omitted, and upon precisely the same terms of other pleas of like character in other cases.

The bare fact of answering and admitting indebtedness or effects does not discharge the garnishee; he should pay the amount of the indebtedness admitted into court in the one instance, and in the other should turn over the effects in hand to the sheriff, in order to entitle him to a discharge. and these facts should clearly appear by the proceedings When this is done in open court, and his disin the case. charge is moved for, if the plaintiff is dissatisfied with the answer, he may traverse it. It may, perhaps, not avail him that the fund to which he answers as being in hand may not be subject to the garnishment, because of its being daily wages due the defendant as a mechanic. paid into court, the defendant, if he sees proper so to do. may claim its exemption from the garnishment on that ground, or he may waive his right to have it exempted, and the plaintiff has the right to contest the fact that the fund returned as in hand arises from daily wages due the defendant as such mechanic.

In any view that we can take of this case, we think there was error in refusing to allow the plaintiff in attachment to traverse the garnishee's answer at the time be proposed so to do; of course he should have been required to file it upon the terms and conditions that all other amendments to pleadings are allowed. We decide the broad question that he had the right to file it at the time he made his application, which right seems to have been denied him.

Judgment reversed.

#### Ingram re. Fisher.

#### INGRAM vs. FISHER.

Where a plaintiff in ejectment relied upon a deed which described the land only by the numbers of the lots, but not by metes and bounds, it was admissible for the defendant to prove by parol that, prior to the sale to plaintiff, a road had been opened on the south of said lots; that they only extended to the road, and that, before the plaintiff bought, defendant had shown him the boundaries of the land extending to the road on the south. Such evidence did not contradict the deed, but identified the land conveyed by it.

Evidence. Deeds. Title. Before Judge ADAMS. Mc-Intosh Superior Court. November Adjourned Term, 1882.

Reported in the decision.

FRASER & WILSON, by W. G. CHARLTON, for plaintiff in error.

LESTER & RAVENEL, for defendant.

Blandford, Justice.

This was an action of ejectment, brought by plaintiff against defendant, for the recovery of lots of land, numbers 9, 10 and 11, in McIntosh county. The jury, on the trial, found for the defendant. Plaintiff moved for a new trial on several grounds. The court overruled the motion, and plaintiff excepted, and assigned as error the refusal to grant said motion.

On the trial of said cause, plaintiff introduced a deed from Chas. Spalding to said lots, made to said Fisher, with a plat thereto attached; also a deed from Fisher to plaintiff to said lots, without any description of boundaries, or number of acres mentioned therein. The defendant then offered to prove that, before plaintiff purchased said land, he showed him the boundaries of the same; that, on the south of said lots, a certain road had been opened, and that said lots only extended to said road. The plain-

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tiff objected to the admission of said evidence. The court overruled said objection, and this is the main exception now urged.

This testimony was admissible. It did not tend to contradict, add to, or vary, the deed from Fisher to Ingram. That deed did not describe the lands conveyed other than certain numbers therein set forth. The testimony admitted showed the lands and their boundaries, described in the deed. This evidence was admissible to show what land had been conveyed by the deed from Fisher to Ingram. and it is manifest, from the evidence, that Ingram only purchased the lands mentioned by numbers or bounded by the road which had been laid out and opened by the defendant before the sale. 57 Ga., 109; 48 Ib., 179; 19 Pick., 250; 35 Ga., 290; 16 Ib., 141.

The judgment of the court below, refusing the new trial, is affirmed.

Judgment affirmed.

# WEEMS, trustee, vs. Coker.

- 1. Upon the trial of an issue formed on the foreclosure of a mortgage, it was necessary to show that the debt due by the defendant to the plaintiff was still outstanding and unsatisfied. Therefore, when an issue was formed upon the foreclosure of a mortgage given to secure a negotiable note, upon the trial it was necessary to introduce the note, or satisfactorily account for its absence; and when neither was done, a non-suit should have been granted, on matter therefor.
- A chancellor may grant power to a trustee at chambers w mortgage the trust estate, on a proper proceeding for that purpose. The power to allow a sale includes the power to allow a mortgage.

(a.) The case of Iverson et al. vs. Saulsbury, Respess & Co., 68 fine 790, reviewed; the majority decision reversed, and the dissenting opinion of Jackson, C. J., approved.

3. The evidence in regard to the beneficiary alleged to be non continuentis is too meagre to warrant a decision as to her rights separate defence was made as to her.

(a.) As a new trial will be had, the pleadings can be so amended to protect her rights, and admit proof on all the questions established to that end.

October 2, 1883.

#### Weems, trustee, rs. Coker.

Mortgage. Trusts. Sales. Equity. Before Judge RONEY. Lee Superior Court. March Term, 1883.

Reported in the decision.

B B. Hinton, for plaintiff in error.

HAWKINS & HAWKINS, for defendant.

HALL, Justice.

This was a proceeding to foreclose a mortgage. response to the rule nisi, calling on the defendant to show cause why he should not pay into court the money due on the mortgage, or, in default thereof, why the equity of redemption in and to the premises should not be barred and foreclosed, he replied that the mortgage was made by a trustee, in pursuance of an order granted at chambers by the judge of the superior court; that such judge had no authority to make the order at chambers, and that the mortgage thus executed was void and of no effect; and upon the issue formed, the case was submitted to a jury. The plaintiff introduced his mortgage to the jury, and closed his case. The defendant thereupon moved a nonsuit, because the note the mortgage was given to secure was not forthcoming, and its absence had not been accounted for. This motion was refused, and the defendant excepted.

1. We must presume that, when the rule nisi was granted, the court had before it evidence that the debt for which the mortgage was given, was still outstanding and unsatisfied. At the trial of this issue, that was the important fact to be shown. The debt was the principal and the mortgage the incident; the non-existence of the former, or its extinction, was the destruction of the latter. If the mortgage was material to determine the issue submitted, surely the note upon which it was founded, and without which it had neither force nor vitality, was material. It

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was demanded by the motion made; over was, in effect, craved; and it should have been produced, or its absence accounted for. The proceedings in the case show that the note was negotiable, and the plaintiff's failure to produce it, or to give any account of it when called upon to do so, would warrant the conclusion that he had ceased to control it. If it was in the hands of an innocent bona fide holder, the defendant would not have been protected in a suit brought upon it, by such a transferee, and could not have successfully defended himself against such a suit. It is apparent, from what transpired on the trial, that this note was not present, and that the foreclosure of the mortgage was granted in its absence. In the factof the facts disclosed by this record, it would be going too far to pre sume that this proceeding was regular, and that the court had before it this paper when the judgment of foreclosure was entered. To permit a judgment to go, in the absence of proof of the indebtedness on which the mortgage is founded, would be to sanction an unauthorized and, as it seems to us, a dangerous practice. When attention was called to the fact that the note had not been introduced. and the motion in question was made, if the note had been present, or if it had been in the custody, or under the control of the plaintiff, and absent for any cause, or if it had been lost or destroyed, an announcement of either of these facts would have satisfied the defendant's objection and have let in other proof of its existence, or have furnished ground for such a disposition of the case as would have protected the rights of the parties. To entertain the idea that counsel were experimenting to see if this forcelosure could not be had upon inadequate testimony, by withholding any portion of it under their control, would be a reflection upon their fairness and intelligence, which we are unwilling to indulge, and which it would not be proper to make. The statute (Code, §3964), expressly provides that the respect ent to a rule for foreclosure "may set up and avail himself of any defence which he might lawfully set up in an

#### Weems, trustee, re. Coker.

ordinary suit, instituted on the debt or demand secured by such mortgage, and which goes to show that the applicant is not entitled to the foreclosure sought, or that the amount claimed is not due."

Could there be a more conclusive defence to the foreclosure than that the party prosecuting it was not the holder of the debt or demand secured by the mortgage, which he failed to produce when called on, and offered nothing to show that he controlled it, or to explain why it was not forthcoming at the trial? Surely, it will not be contended that judgment could be rendered in an ordinary suit upon this demand, without the production of some evidence of its existence, and the right of the plaintiff to control it.

On this exception the judgment of the court below must be reversed.

2. The next question presented for our determination is, whether the judge of the superior court has power, by an order made at chambers, upon a petition regularly presented by all the proper parties, to incumber a trust estate by authorizing the execution of a mortgage upon it? It is conceded that he has jurisdiction to order a sale, but it is said that this power does not include the power to direct a mortgage; and so it was ruled by a majority of this court, in Iverson et al. vs. Saulsbury, Respess & Co., 68 Ga., 790. The Chief Justice, however, delivered a dissenting opinion in that case, to which he adheres, and in which the other members of the court concur. It is the unanimous judgment of this court that the dissenting opinion contains the law of the question; that the power to order a sale includes the power to order a mortgage; and that the judgment of the court in that case be, and the same is, hereby overruled. Those who were cotemporaneous with the passage of the act of 1853-4, placed upon it the construction now given, and for nearly thirty years previous to the decision above referred to, the courts of the state, as far as we have been able to ascertain. Weems, trustee, vs. Coker.

acted upon that construction, and passed just such orders as that now in question. It is settled, and so laid down in all the elementary treatises, that, where power is given to raise money to pay debts, or remove incumbrances by a sale, the power is well executed if the money is raised upon a mortgage. 1 Sugden, Powers, 513, 485; Hill on Trustees, 475; Lewin on Trusts, 416, and many others that might be cited. They all refer to Mills vs. Banks, 3 P. Wms. 1, as the leading case upon the subject. tainly the earliest that we have found, having been determined in 1724. Lord Macclesfield, who delivered this judgment, was reviewing, on a rehearing, the decision of his predecessor, Lord Cowper, who had ordered this mortgage and said that he "should not have made the decree, but the same having been made, and this being a rehearing, as it is in the discretion of the court whether they will grant a rehearing, it is equally so whether they will do anything thereon. Moreover, when an infant's money has been lent, under a decree and by the approbation of a master, for the court to make another decree, setting aside this security, would be to make the court fight against itself and act inconsistently. The court never gives any aid against a purchaser or mortgagee without notice. This is a stronger case; for, though here is notice of the settlement, here is also notice that the court has declared and decreed that the term thereby raised. and the trusts declared concerning the same, empower the trustees to sell the premises for raising the money; and a power to sell implies a power to mortgage, which is a conditional sale."

In this state, the judge of the superior court, as chancellor, has jurisdiction over the sale of trust estates, upon a petition at chambers, and a decree rendered upon such a petition is as valid and as little liable to attack as it would be had it been made in open court by the judge and jury, upon a bill filed for the purpose. It should afford protection to a purchaser under it.

#### Weems, trastee rs. Coker.

We do not find anything in Mrs. Weems' marriage settlement, as was insisted by the able counsel for the defendant in error, that would authorize this transaction. She and her husband jointly have the right to use the property for the support of themselves and family, without account to the trustees, and the latter are empowered, with her written consent, to sell for investment. A sale or mortgage to raise money for the support of the family, or for the improvement and use of the trust estate, would not be a proper execution of either of these powers.

3. It is insisted by counsel for plaintiff in error, that the chancellor had no authority to order Miss Ingram's portion of this land and stock to be mortgaged, because she is non compos mentis, and her property is not held in trust in such a sense as would give him jurisdiction over it. separate defence was made for her to this proceeding for foreclosure, and the evidence is entirely too meagre to enable us to pass upon the questions raised. There are intimations in this record that her mother was her guardian; whether she was her guardian as a minor, or as an adult non compos mentis, does not appear. This property was conveyed to another person for her use. Whether she was then under age, or had attained her majority and was under disability, is equally doubtful, from the facts in this record. As this case goes back for another hearing, the pleadings may be so amended, if deemed advisable, as to protect her rights in the premises, and to admit proof on all questions essential to that end. None of the questions in this case could be made on the motion in arrest of judg The documents on which it was based formed no part of the record; they were a part of the proof, and the motion is necessarily founded on errors in the record.

Judgment reversed.

#### Goode vs. The State.

## GOODE VA. THE STATE OF GEORGIA.

Where a defendant was tried and acquitted under an indictment charging him with larceny from the house and alleging the ownership of the house and of the goods stolen to be in the prosecutor, and was subsequently arraigned under another indictment for larceny from the house, alleging a different ownership of the house, and of the goods stolen, and a different day on which the offence was committed, a plea of autre fois acquit, setting out fully the first indictment and the proceedings had thereunder, and averring that the transactions embraced in both indictments were one and the same, was good and should not have been stricken on demurrer.

- (a.) The facts in this case are the reverse of those in 63 Ga., 307.
- (b.) The first indictment does not appear to have been defective. The place of the larceny was stated with sufficient certainty to enable the jury easily to understand, with the aid of proof, the house indicated; and, though the goods alleged to belong to the prosecutor in fact belonged to a firm of which he was a member, he had a right to their custody. Even if the indictment did not fully and accurately describe these circumstances, it would not prevent the defendant from pleading former acquittal.

November 6, 1883.

Criminal Law. Former Acquittal. Verdict. Before Judge Branham. Henry Superior Court. April Term, 1883.

Richard Goode was indicted for larceny from the house, and was acquitted. The body of the indictment was as follows:

"The grand jurors \* \* \* charge and accuse Richard Goode, of the county and state aforesaid, of the offence of larceny from the house; for that the said Richard Goode, on the first day of September, in the year 1880, in the county aforesaid, did then and there, with force and arms, the house of one R. T. Harper, there situated, did enter in the daytime, and after having entered, two hams of bacon of the value of ten dollars, one hundred and ten dollars of United States treasury notes, or national bank bills, of the denomination of twenty, ten, five, two and one dollar bills, of the value of one hundred and ten dollars, ten dollars in silver coin in dollars, half dollars, quarters and ten cents, of the personal goods of the said R. T. Harper, in said store-house being then and there found, did wrongfully and fraudulently take and carry away, with the intent then and there to steal the same, contrary" etc.

#### Goode vs. The State.

He was then reindicted, the second indictment charging that on the first day of October, 1880, defendant committed the offence of larceny from the house. The ownership of the house was alleged to be in Mrs. M. E. Harper, and that of the goods stolen to be in Harper & Turner, a firm composed of R. T. Harper and G. F. Turner, doing business in the house. Defendant pleaded autre fois acquit, alleging that the two indictments were based on the same transaction, and were, in fact, two indictments for the same crime. On demurrer, the plea was stricken, and defendant excepted.

- J. L. Tye; S. C. McDaniel; W. H. Hulsey, for plaintiff in error.
  - E. Womack, solicitor general, for the state.

HALL, Justice.

Richard Goode was indicted, tried and acquitted upon an indictment charging him with larceny from the house. The larceny was charged to have been committed in a house belonging to R. T. Harper, the prosecutor, and the goods stolen were charged to be his property.

Upon his acquittal, he was held and another bill of indictment was preferred and found, charging him with the same offence, in stealing in a house belonging to M. E. Harper, the goods jointly owned by R. T. Harper & Turner. A different day was alleged in this indictment from that laid in the first on which the theft was committed. When the defendant in this last indictment was arraigned and called upon to answer to it, he pleaded autre fois acquit, setting out in his plea the first indictment and the proceedings had thereon in have nerba, and averring that the transactions embraced in both indictments were one and the same. This he offered to prove and demanded judgment upon his plea. Instead of taking issue thereon, the state demurred to this plea, and the demurrer was sustained,

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and this makes the question presented for our determination.

It does not appear that the first indictment was defective; indeed the plea avers that it was not, though the larceny, out of which the prosecution grew, is differently set forth in the two indictments, as to the ownership of the house in which it was committed, and of the goods alleged to have been stolen, and the day on which the theft is charged to have been committed; and the discrepancies are fully explained by the plea, and what would seem to be distinct transactions upon the face of the indictments are fully identified as one and the same larceny.

"In all pleas of former acquittal or former conviction. the proof of the plea has to consist partly of matter of record and partly not of record. And the identity of the two cases is the part of the plea which it is the peculiar business of the evidence, which is not of record, to make out," per Benning, J., Sweeny's case, 16 Ga., 468, 469. Affirmed in Stringfield's case, 25 Ga., 476, in which McDonald, J., delivered the opinion. That the demurrer admitted the allegations in the plea, and that the identity of the crime charged in both indictments is therein fully and sufficiently set forth, has not been questioned. See a collection of all these cases on this particular subject admirably classified and arranged in Hopkins' Penal Laws, §1579 to 1581, both inclusive.

The case at bar falls within the principle settled in Buhler's case, 64 Ga., 504, 505, and is controlled by it. There the defendant was indicted and convicted of stealing "a brindle cow, with one horn knocked off about two inches from the point of the horn, white spot in her fore-head, and white on her tail from the but about a foot, of the value of \$10.00, the property of Peter Howell." At the same term of the court the defendant had been tried and acquitted upon an indictment charging him with having stolen a small red cow with cloven hoofs, and horns, of the value of seven dollars, of the property of Peter

### Gode w. The State.

Howell. The acquittal on this indictment was pleaded in bar of the other, and it appearing that Peter Howell had but one cow, and that he had never prosecuted the defendant except for the stealing of the one cow, it was held that both indictments covered the same transaction, and that the acquittal on the first indictment tried barred the prosecution on the last and entitled the defendant to his discharge.

It is true, that this court held in Morgan's case, 63 Ga., 307, where a burglary was charged to have been committed in a dwelling-house of a certain woman, and it appeared in evidence that it was rented by her husband and occupied by him and his family, including her, and no other right or title to it in her was shown, the evidence did not support the indictment. Because, in legal contemplation, it was his house as the head of the family, and not hers." Precisely the reverse of this proposition is true here; the store-house in which the larceny was committed, though belonging to the wife, was in the occupancy of the husband and his partner; who were carrying on business in it at the time; he had a right to its possession, and the legal presumption on which Morgan's case was put did not exist in this case.

The place of the larceny set out in the first of these indictments was, under our system of criminal pleading, sufficiently certain to enable the jury easily to understand, with the aid of proper proof, the house indicated. Code, §4628. These considerations are equally applicable to the misdescription of the property in the goods alleged to have been stolen; true, they were not the goods of the prosecutor only, but belonged jointly to him and his part ner; he was seized per my and per tout, he had a right to their custody, had them in his actual possession at the time, and upon conviction there would have been no difficulty in restoring them to the proper owner. Stringfield's case, 25 Ga., ut supra.

Even conceding the correctness of the position as to

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these minor matters assumed by counsel for the state, then it does not follow that the defendant could not have availed himself of an acquittal, where he was tried upon an indictment that did not fully and accurately describe these circumstances. The indictment upon its face was not defective, and the only material question for consideration is, whether the transaction set out in both indictments is the same.

The plea in this case was not demurrable, and the court erred in so holding.

Judgment reversed.

# Brown vs. Moughon.

An entry of levy in these terms: "I have this day levied the within f. fa. on lots of land numbers 308, 309, 310, 332, all levied on as the property of (defendant in f. fa.,) to satisfy an execution issued from the 957th district of Baker county, G. M.; property pointed out by the plaintiff," was void for want of sufficient description, and when offered in evidence, together with the deed based thereon, they were inadmissible.

(a.) Where the sheriff, in the deed based on such a levy, sought to locate the land by county and district, the deed did not conform to

the levy.

(b.) The execution, levy and sheriff's deed should not have been submitted to the jury, to enable them, with the aid of such other facts as might have been adduced, to locate and identify the land. This case differs from those in 12 Ga., 440; 59 Ib., 649, and this court adopts the dissenting views of Jackson, C. J., in 65 Ga., 201.

(c.) That the execution and levy were allowed to go to the jury, was not an error against the claimant under them; and his adversary

did not except thereto.

September 18, 1883.

Levy and Sale. Evidence. Title. Before Judge Bowgs. Baker Superior Court. May Term, 1883.

A fi. fa. in favor of Moughon et al., for use, was levied on certain land as the property of E. C. Brown, and a claim was interposed by Mary A. Brown.

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On the trial, claimant offered in evidence a fi. fa. against Brown, with an entry of levy thereon, and a sheriff's deed under the sale. The entry of levy was as follows: "I have this day levied the within fi. fa. on lots of land numbers 308, 309, 310, 332; all levied on as the property of Enoch C. Brown, to satisfy an execution issued from the 957th district of Baker county, G. M. Property pointed out by plaintiff."

The sheriff's deed contained the same description, except that it located the lots as being in the 7th district of Baker county. These papers were rejected as a conveyance of title out of defendant in fi. fa., but were admitted as color of title.

The jury found the property subject, and claimant excepted.

A. L. Hawes, for plaintiff in error.

R. Hobbs; D. H. Pope; D. A. Vason, for defendant.

# HALL, Justice.

The execution offered with the sheriff's deed to sustain this claim was issued from a justice's court in Baker county, and levied by a constable of that county, on certain lots of land, giving their numbers only, without any further description as to their locality; the county and district in which they are located is not set forth in the levy, nor are they described as being in the possession of the defendant or any other person. In the deed conveying them to the purchaser at the sale under this levy, the sheriff undertakes to locate them by county and district. It is evident that the deed does not conform to the levy, which is so uncertain as to the land sold as to render it impossible from the description to locate it; it should have been specified in the levy and advertisement with such precision that it could have been ascertained what land it was that was The observance of this requirement is said to be sold.

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specially important in the case of sheriff sales. The rule is an excellent one to prevent fraud and speculation at such sales. Such levies are void for uncertainty. The reasons for requiring this particularity are strongly set forth and amply sustained by authority in the luminous opinion delivered by Lumpkin, J., in Whatley vs. Doe, ex dem. Newsom, 10 Ga., 74.

But it is urged in argument here that, notwithstanding this fatal defect, the execution and levy together with the sheriff's deed purporting to convey the property sold thereunder, should have been submitted to the jury, to enable them, with the aid of such other facts as might have been advanced, to locate and identify the land. Such a course, we think, would enhance the very evils which the rule was designed to suppress. In a single case a majority of this court has sanctioned its relaxation to a limited extent, but in that case the description of the property was perhaps somewhat more definite than it is in the present levy. The cases cited from 12 Ga., 440; and 59 1b., 649, are not in point. In the first, the levy described the property fully and accurately: the description of the property levied on in the advertisement of its sale was somewhat vague and indefinite; and the court directed the question to be submitted to the jury to ascertain from the evidence whether the property advertised was the same as that levied on-In the other case, it appears that there had been irregularities in the notice given of the levy to the party in possession, in the advertisement, etc., and the question submitted to the jury was whether the purchaser at the sheriff's sale had notice of these irregularities. The case above referred to as sustaining this position, and which approaches it more nearly than either of the foregoing, is that of Williams & Company vs. Hart, 65 Ga., 201, but this was not the judgment of a full court. Jackson, J., who delivered the opinion, plainly and openly dissented from the opinion of his colleagues, using this clear and forcible language: "My brethren think, and it is so ruled, that it is a question for the jury, under all the facts, (a purchaser having

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bought it at public sale); where the rights of a purchaser intervene they uphold it, but before sale and purchase, all agreed that the levy would be insufficient. My own judgment would be that it is too vague and indefinite a description to pass title to any purchaser to a house and lot in the village. The only description is 'nine hundred acres of land in and in the vicinity of Union Point.' It is not even said that it was known to be the property of James B. Hart (the defendant in execution). That such a description should authorize the sale of a dozen houses and lots. occupied by different families in a town, though unincorporated, as well as a plantation outside the town, a steam saw mill, etc., would be, it seems to me, to open wide the door to all manner of fraud, and no man ought to buy, under such a levy, improved lots and houses in the town. and expect to hold them. The statute, Code, \$3640, declares that the officer making a levy 'shall plainly describe the property levied on, and the amount of interest of defendant therein; and section 3647 declares that, in the 'advertisement, he shall give a full and complete description of the property to be sold, making known the name of the plaintiff and defendant, and the person who may be in the possession of such property.' How anybody could imagine that he was buying improved property, occupied by tenants in a town, under an advertisement of land in the vicinity' of the town, passes my comprehension; and how a levy on nine hundred acres of land' in and in the vicinity of a town, plainly describes houses and lots in the town, it is equally difficult for me to see. My brethren agree that it is a circumstance going to show fraud, but that it is for the jury to say whether or not the houses and lots were so levied on and advertised as to convey title to the purchaser, while I hold that such a levy and advertisement cannot pass title at all, so far as the improved lots laid off and built upon and occupied in the town are concerned."

It is the unanimous opinion of the present court that this dissenting view embodies a correct exposition of the Wilder & Company vs. Mayor, etc., of bayannah.

law; and we so hold. In conformity to the hallowed orison, "lead us not into temptation," it appears to us to be sound policy to take away all inducements to commit fraud. The sections of our Code above cited were evidently framed with this view. The first accomplishes this object in prescribing the requisites of a levy, and is in strict accordance with the rule laid down in Whatley vs. Doe, ex dem. Newsom, a case which appears to have been overlooked in determining Williams & Co. vs. Hart, while the second, in requiring like particularity in advertising the sale under the levy, is in furtherance of the same wise and conservative policy. Judge Warner was on the bench when Whatley vs. Doe, ex dem. Newsom, was decided, and concurred with his associates in that judgment, notwithstanding he gave his consent to the views of the majority in the case of Williams & Co. vs. Hart. The two appear to us irreconcilable, and we can account for the difference only by the fact that that decision was overlooked when the last was made.

The court below may have committed error in the present case in allowing the execution and levy to go to the jury as color of title, when the claimant did not set up prescriptive title, or rely upon adverse possession under such color for the statutory period. But whether it did or not, is quite immaterial, in view of the fact that such error, if error it be, did not hurt the claimant, and the plaintiff waives the point by refraining from excepting to the decision.

Judgment affirmed.

# WILDER & COMPANY vs. MAYOR, ETC., OF SAVANNAH.

 Under the charter of the city of Savannah (Code, §4847) the mitnicipal authorities have power to classify and arrange the various businesses, trades, etc., carried on in the city, into such classes of subjects for taxation as may be just and proper. Where such classification has been made, and a tax imposed upon persons on Wilder & Company vs. Mayor, etc., of Savannah.

gaged in the business of commission merchants or factors, and also upon agents of steamboats and vessels, and upon agencies for ocean steamships, persons conducting more than one of these businesses could be required to pay a tax upon each, unless it should be made to appear that there was a custom of conducting the two occupations together of such universal practice as to justify the conclusion that by implication they were one and the same business.

 Authority to tax all persons exercising any profession or business may be exercised by taxing each member of a firm so engaged separately.

February 9, 1884.

Municipal Corporations. Taxes. Custom. Partnership. Before Judge Adams. Chatham Superior Court. June Term, 1883.

Reported in the decision.

- J. R. Saussy, for plaintiffs in error.
- H. C. CUNNINGHAM, for defendants.

# HALL, Justice.

There are only two questions in this case which it is material to consider, raised by the facts which appeared upon the trial:

- (1.) Whether commission merchants, who unite with that department of business an agency for steamboats. vessels, or other agency, are subject to a separate city tax upon such branch of the business; and
- (2.) Whether each individual of a firm conducting such business is liable to the said tax.

The mayor and aldermen of the city of Savannah, by their tax ordinance, passed February 6, 1879, imposed a business tax on every commission merchant or factor, each and every individual member of a firm or partnership, fifty dollars. Every steamboat, vessel or other agency, fifty dollars. Every agency for ocean steamships, one hundred dollars.

Wilder & Company re. Mayor, etc., of Savannah.

The plaintiffs in error were, at the time of the levying of the said taxes, commission merchants, and each firm was composed of two or more members, doing business in the city, and engaged in the shipping business, being agents for vessels, both steam and sail, and both regular lines and transient ships. They tendered to the municipal authorities a business tax of fifty dollars to cover their said business as commission merchants, and by their bill of complaint sought to enjoin the municipal authorities from collecting any further or other business tax from them. They alleged that, as commission merchants in a seaport, it was a part of their legitimate business, and incident thereto, to be the agents and consignees of vessels; that for such business they charged and received regular commissions; that the commission business in the consignment of ships was not a distinct and separate business, but as much a part of a commission and factorage business in a seaport as the consignment of cotton or produce. The defendant in error offered no testimony, and the court charged the jury that the complainants were liable to the taxes sought to be enjoined, and directed them to render a verdict in favor of the defendant.

1. The legislative grant of the taxing power to the authorities of the city of Savannah, is quite liberal and comprehensive; they are authorized to levy such taxes and make such assessments as they may deem expedient for the safety, benefit and advantage of the city, not expressly prohibited or exempted by the state law, or competent authority of the United States, upon the inhabitants carrying on any business in the city, upon real and personal property therein located, "capital invested therein, stocks in money corporations, choses in action, income and commissions derived from the pursuit of any profession, faculty, trade or calling, dividends, banks, insurance, express, and other agencies, and all other property or source of profit." Code, §4847.

Wilder & Company vs. Mayor, etc., of Savannah.

In the Mayor and Aldermen of Savannah vs. Feely, 66 Ga., 31, 37, this court held that, whether the right to tax omnibuses, baggage wagons and other vehicles run by a livery stable keeper, who had paid his city tax for the livery stable alone, to and from the railroad depots in Savannah, was included in that tax, would depend upon the custom of such trade or business in the city; but that the custom was binding on the city authorities only when it was of such universal practice as to justify the conclusion that by implication the two occupations were one and the same business.

There was, in the present case, no evidence whatever of a universal practice, to justify the conclusion that the occupations united by the complainants were one and the That they were and had been united in same business. specified instances, was not proof of a custom so universal as to make it binding. Robertson vs. Wilder & Co., Under the charter of the city of At-69 Ga., 340. lanta, a merchant doing a dry goods business united therewith several branches of trade usually treated as distinct therefrom, and having paid the tax on his principal occupation, resisted that which was imposed on the others he had combined therewith, but he was held liable for each separate imposition. Keely vs. The City of Atlanta, 69 It is true that, in this instance, express authority was given "to classify and arrange the various businesses, trades, etc., carried on in the city, into such classes of subjects for taxation as might be just and proper. In what does this differ from a discretionary power to lay such taxes and make such assessments as may be deemed expedient for the safety, benefit and advantage of the city? We can perceive none but a verbal difference: in substance the two grants are identically the same.

2. The question as to taxing the individual members of firms per capita is controlled by the decision of this court, in Lanier vs. The Mayor, etc., of Macon, 59 Ga., 187.

#### Hart vs. Hart.

There was no error in the several rulings of the court below, and no other verdict than that returned could have been rendered.

Judgment affirmed.

# HART vs. HART.

1. The birth of a posthumous child revokes a will.

2. An owner of property died leaving a will, which was probated, and letters of administration with the will annexed were granted; the administrator made oath and gave bond for a faithful execution of the will according to law. After the death of the testator, a post-humous child was born to him:

Held, that the birth of the child revoked the will, and also worked a revocation of the letters of administration. The oath bound the administrator, and the bond bound him and his sureties, for his faithful execution of the will, but they were not bound for the administration of the estate as in cases of intestacy; and when an intestacy was declared by the revocation of the will, the matter, as to the administration of the estate, stood precisely where it would have originally stood, had there been no will.

September 25, 1883.

Wills. Administrators and Executors. Before Judge Fort. Schley Superior Court. March Term, 1883.

Reported in the decision.

B. B. Hinton, for plaintiff in error.

E. M. BUTT; GUERRY & Sons, for defendant.

BLANDFORD, Justice.

Isaac Hart having died, leaving his last will and testament, the same was probated by the court of ordinary, and no executor having been named in said will, letters of administration were granted to Samuel G. Hart by said court, who gave bond with security as the law directs. After this, there was a posthumous child born to Isaac Hart, testator. Upon application to the court of ordinary, the will was set aside and an intestacy declared, and the letters of ad-

ministration granted to Samuel G. Hart were revoked. This judgment of the court of ordinary was carried by appeal to the superior court, which latter court affirmed the proceedings had before the court of ordinary, and this action of the superior court is the subject of complaint now here before this court.

The birth of a posthumous child revoked the will of Isaac Hart, the testator. But the plaintiff in error insists that it does not revoke the letters of administration cumtestamento annexo granted to Samuel G. Hart, the plaintiff in error.

The oath of this administrator required him to execute the will annexed to his letters. The bond which he gave bound him and his sureties for the faithful execution of the will according to law, and he and his sureties were not bound for the administration of the estate of said Isaac as in cases of intestacy; and where there was an intestacy declared by the revocation of this will, the matter as to the administration of this estate stood precisely where it would have originally stood had there been no will. The judgment of the superior court was in accordance with these views, and the same is hereby affirmed.

Judgment affirmed.

# TURNER vs. THE STATE OF GEORGIA.

- 1. Grounds of error abandoned will not be considered.
- (a.) Where, after the discharge of the traverse jurors for the first week of the regular term of court, but during the attendance of those summoned for the second week, the judge ordered that the traverse jurors of the regular term attend a special term to be held at a time fixed, a reasonable construction of such order would be, that the jurors in attendance when the order was put upon the minutes, should attend such special term, not those which had been discharged.
- (b.) The court may draw a new jury for a special term, or may compel the attendance of those from the regular term; and jurors from the regular term, competent when drawn, are competent on the

- trial, although there may have been a revision of the jury box since they were drawn.
- Motions for continuance are addressed to the sound discretion of the presiding judge, and unless abused, such discretion will not be controlled.
- (a.) A motion for continuance being based on the absence of a witness who was in another state, and whose testimony would be only corroborative of that introduced, and no means of procuring the attendance of such witness being shown, there was no abuse of discretion in refusing the continuance.
- (b.) Where a continuance was asked in a criminal case on the ground of the sickness of one of defendant's attorneys, but the defendant swore that another one of his attorneys, of whom he had four, was leading attorney, and did not swear that he could not go safely to trial without the services of the absent attorney, there was no abuse of discretion in refusing the continuance; nor was it rendered necessary, on a renewal of the motion, because of the introduction of testimony tending to show that the absent attorney was the leading one for the defendant.
- 3. Where, on a trial for murder, another indictment for murder against the defendant, in which the deceased was the prosecutor, was admitted in evidence, it was not error of which the defendant could complain that the court confined the jury to the consideration of that indictment for the purpose of illustrating motive or malice towards the deceased, and stated that the presumption was that the accused was innocent in that case.
- A witness who had long known the deceased could give his apinion of the latter's character as dangerous or otherwise.
- (a.) Whether a witness is successfully impeached is a question for the jury. If so impeached, he should not be believed; if comborated, he may be believed, and the corroboration may be by circumstances or by other witnesses.
- (b.) Section 4234 of the Code was inapplicable to the case.
- 5. Where one knows the general character of a witness in the town where he once lived, he may testify as to that character for veracity, although the witness has moved several miles into the courtry. The weight of such testimony is for the jury.
- (a.) A charge that "inasmuch as murder embraces the lower grades of homicide, the defendant can not only be convicted of murder under the indictment in this case, if the evidence should authorize it, but if not guilty of murder may be guilty of voluntary man slaughter, if the evidence require it," was not error. The used the words "authorize" and "require," in order to vary the expression, could not harm the defendant.
- (b.) The verdict is supported by the evidence.
- 6. Where the surety on a defendant's bond in a criminal case requested

the presiding judge to say to the sheriff that if the defendant was tried, he desired to be relieved as soon as the trial commenced, which message was delivered, and after a motion for a continuance had been overruled, and at the dinner recess, before any of the jury were empanelled, the defendant was taken into custody by the sheriff, there was nothing in this to require a new trial, it not appearing that the defendant was kept in such custody as not to have freedom of intercourse and consultation with his counsel.

- 7. Unless the attention of the court is called to the use of vituperation by counsel towards defendant in a criminal case, and the making of statements of fact outside of the evidence, a failure to stop counsel in argument is not good ground for new trial.
- 8. Where allegations of partiality on the part of a juror are met and rebutted by his own affidavit and those of others, showing his impartiality, sustaining his character for uprightness and truthfulness, and that bad feeling existed between him and the witnesses who testified as to his partiality, there was no error in refusing a new trial.

November 13, 1883.

Criminal Law. Continuance. Attorney and Client. Evidence. Witness. Charge of Court. Jurors. Before Judge Harris. Meriwether Superior Court. December Special Term, 1882.

Pleasant M. Turner was indicted for the murder of John E. Shuttles.

On the trial, the evidence showed that the defendant shot Shuttles in the back with a pistol and killed him. The defence was that the deceased and defendant had had numerous difficulties; that, before the killing, the deceased had threatened the life of defendant; that he had pursued the defendant about the town of Greenville on the day of the killing, was armed, and sought to force a difficulty with the defendant, who avoided him; that he finally followed defendant into a bar-room where the killing occurred; that the deceased was drinking, and when in that condition was a violent and dangerous man; and defendant's own safety required that he commit the homicide.

In opposition to this, the state introduced testimony to show that, at the time of the homicide, defendant had just taken a drink, and was standing in the bar-room; that the deceased came in, and walked past the defendant without noticing him, and that the defendant shot him in the back without saying a word; that after the difficulty or threatened conflict set up by the defence, there had been a reconciliation, and no danger was imminent when the homicide took place; also, that defendant had made some threatening speeches in regard to the deceased, and had armed himself during the morning preceding the killing.

The evidence was voluminous, and, in parts, conflicting, but it is unnecessary for it to be set out in detail.

The jury found the defendant guilty. He moved for a new trial on the following grounds:

(1), (2), (3.) Because the verdict is contrary to law and evidence.

(4), (5.) [Abandoned.]

(6.) Because the court, on demurrer, struck the motion made by defendant to quash the panel of jurors on the following grounds: First, [abandoned.] Second, because, at the August term of court, 1882, the court passed an order that the jurors impanelled at that term should attend a special term at which the trial took place, but, in fact, only the jurors of the second week of the August term attended the adjourned term, and were put upon the defendant, and the jury of the first week of the August term were entirely omitted. [The August term lasted two weeks. Jurors were impanelled, attended during the first week and were discharged. Other jurors were impanelled, and upon the passage of the order they attended the special term.] Third, because the jury box was revised August 7, while the order requiring the attendance of the jurors at the special term was passed August 30: and defendant was entitled to have a jury drawn after the revision.

(7), (8.) Substantially the same as (6).

- (9.) Because the court refused to continue the case on the ground of the absence of one Carlile. [It appeared that the witness had moved to Florida, and his testimony, if obtained, would be cumulative to that which was introduced.]
- (10.) Because the court refused a continuance on the ground of the sickness of A. H. Freeman, Esq., one of counsel for defendant, he being present but unable to participate actively in the case. [It appeared that defendant was represented by four attorneys, and there was some question as to who was the leading one. The defendant stated that he considered A. H. Cox, Esq., as his leading counsel. The motion was renewed later on, and other testimony was introduced to show that Freeman was most familiar with the case, and had been first employed. The motion was first made after the beginning of the introduction of testimony, when Freeman became so unwell as not to be able to give his usual attention to the case.]
- (11.) Because the court refused to continue, on the ground just stated, the motion being again urged later in the trial.
- (12.) Because the court erred in the following practice: An indictment for a former homicide against the defendant was put in evidence to show that the deceased appeared as prosecutor therein. The court remarked, in admitting the indictment, "It is simply the isolated fact that he was prosecutor in that case alone. That is all the jury can consider in reference to that testimony."—The objection was that this was an expression of opinion.
- (13.) Because the court admitted the following testimony of Adams, one of the witnesses: "I would not consider him (deceased) a dangerous man—a man calculated to disturb a peaceable community, unless he was imposed on. I do not think he was afraid of anybody. I don't think he would raise a difficulty." The witness testified afterwards that he did not know what people said of the deceased, or what was his general reputation in the neigh-

- borhood. The objection was that the opinion of the witness as to the character of deceased was inadmissible, except as to his general reputation. The witness testified that he was well acquainted with the deceased; had known him ever since the war; and then gave his opinion as stated.]
- (a.) Because the court charged as follows: "An indictment has been offered in evidence against the defendant in which the deceased was prosecutor. This is offered to illustrate, if it does, the question of motive. The law presumes the defendant is not guilty of that charge, and you will only consider this evidence on the question of motive."
- (b.) Because the court charged that a witness, when successfully impeached, should not be believed; it is for the jury to determine whether a witness has been successfully impeached or not; a witness, when impeached, if corroborated by other witnesses or circumstances, may be believed.
- (c.) Because the court failed to give section 4334 of the Code in charge.
- (14.) Because the court allowed the testimony of a witness, introduced for the purpose of impeaching another, to the effect that he had known the latter, who had been a drayman in the town of Greenville for about a year, but his home, at the time of the trial, was about four miles in the country; that he could only answer as to his character in that town—how he was regarded there—and not as to his general character.
- (a.) Because the court charged as follows: "Inasmuch as the crime of murder embraces the lower grades of homicide, the defendant can be not only convicted of murder, under the bill of indictment in this case, if the evidence should authorize it, but if not guilty of murder, may be convicted of voluntary manslaughter, if the evidence require it."
- (b.) Because the verdict was contrary to the charge of the court.

- (15.) Because, after overruling the motion for a continuance, the judge, in open court, instructed the sheriff to take the prisoner into custody, and from that time the defendant was kept in the court house under the surveillance of guards. [The court stated in a note that one of the securities on defendant's bond requested the presiding judge to say to the sheriff that if defendant was tried, he desired to be relieved as soon as the trial commenced; that this message was delivered, and after the overruling of the motion for continuance, at the dinner recess, and before any of the jury were impanelled, the defendant was taken into custody by the sheriff, on his own motion.]
  - (16.) Same as (21.)
- (17.) to (20.) Because C. D. Phillips, foreman of the jury, and William Strozier and C. J. Jackson, members of the jury, were not impartial. [Numerous and conflicting affidavits were introduced by both sides on this subject. On the one hand, it was sought to show that these jurors had made remarks unfavorable to the defendant before the trial. In the case of the juror Jackson, the remarks were to the effect that he had stated that, if he were on the jury, he would hang defendant, and he "hoped to God" he would get on the jury to help hang him. On the other hand, affidavits of the jurors were introduced denying the making of improper statements, and asserting their impartiality; also affidavits of all the jurors of the impartiality of the verdict; that the whole jury thought defendant guilty, and the only question discussed was as to recommending that he be imprisoned for life, and that this was decided almost at once in favor of capital punishment. As to statements made by Jackson, affidavits of several members of a family, known as the Coleman family, were introduced in favor of the movant. The juror stated that there was ill feeling between him and them, and that they were seeking to injure him in public estimation by their affidavits. Other affidavits were introduced on this sub-

ject, and also sustaining the credibility of the different affiants.]

(21.) Because of the use of vituperation concerning the defendant by counsel for the state, in his concluding argument, without restraint by the court. [It appeared that, on a previous interruption by counsel for defendant, counsel for the state replied that defendant's counsel had agreed not to interrupt him. This was admitted; argument proceeded, and the vituperative language was used afterwards without interruption.]

The motion was overruled, and defendant excepted.

A. H. FREEMAN; W. A. TURNER; H. W. HILL; A. H. Cox; P. F. SMITH, for plaintiff in error.

H. M. Reid, solicitor general; J. W. Park; B. F. Mc-LAUGHLIN; T. A. ATKINSON, for the state.

Jackson, Chief Justice.

The defendant was indicted for murder, found guilty, and sentenced to suffer capital punishment therefor.

1. The verdict is supported by evidence enough to uphold it, and, therefore, is not contrary to law because without that support. It remains, then, to see whether it be illegal and should be set aside, because of some illegal ruling of the presiding judge, by which the preservation of law and the ends of justice make a new trial proper. The case will be reviewed by us on the points grouped and argued by the able and distinguished counsel who pressed, with great earnestness and acumen, the cause of his unhappy client before this court.

The first three grounds of the motion are announced by him as formal. The fourth and fifth grounds, in so far as they relate to the order of a special term for the trial of defendant, were abandoned; and upon the sixth ground, the first position on which counsel stood and fought was

taken and maintained, as best could be done. It is a motion to quash the panel of jurors, on the following grounds:

- (1.) The term of court was not lawfully called and not a lawful court. This ground was abandoned.
- (2.) The judge ordered that the petit or traverse jurors impanelled at the August term, 1882, do attend this special court, and the traverse jury now put upon defendant is not composed of said traverse or petit jury of said August term, 1882, but the entire traverse jury of the first week of said court has been left off of the list served on defendant and put upon him; and only the traverse jurors for the second week are in attendance and put upon the defendant.

So far as this point is concerned, the facts are that the traverse jurors for the first week had been discharged when the order was taken that the traverse jurors of the regular term be ordered to attend the special term, and that order necessarily meant the traverse jurors in attend. ance when the order was put on the minutes, and not those discharged; that is, it meant those of the second week and not those of the first. It could not have meant anything else, for the reason that forty-eight jurors of the regular panels, called to serve at different times, could not compose a panel of forty-eight to be put on the prisoner, but the first twenty-four and talesmen always would make such panel first put on the prisoner as the array. So that the court was right so to construe its own order and to tell the sheriff to summon under it only the traverse jurors of the second week of the regular term for the special term.

(3.) The motion to quash the array was based, thirdly, on the ground that the jury-box had been revised since jurors were drawn for the regular term, and therefore, the defendant was entitled to a newly drawn jury for the special term. But the law allows the court, either to draw a new jury for the special term, or to compel the attendance of those from the regular term. Code, §3245. It is

well settled that jurors, competent when drawn, are competent on the trial. 42 Ga., 9; 55 Ib., 391.

The 7th and 8th grounds of the motion for a new trial are covered by the above ruling on the 6th, and were likewise properly overruled. So that the entire ruling of the court below, on the motion to quash the array first argued for plaintiff in error, is approved.

2. The second point refers to the overruling the motion to continue. These motions are always addressed to the discretion of the presiding judge, and much deference is paid to his judgment on questions of continuance. So far as the motion rests on the absence of the witness, it appears that he was in the state of Florida, and beyond the jurisdiction of our courts. 47 Ga., 606; 60 Ib., 257. The matter resting in the discretion of the court below, and no means being shown whereby the witness beyond seas could be got to court, and if brought, his testimony being only corroborative, it is difficult, from the cases just cited

The motion was then renewed on the ground of illness of Mr. Freeman, after the jury was stricken and some testimony in; but the defendant swore that Mr. Cox, not Mr. Freeman, was leading counsel. Moreover, he did not swear that he could not go safely to trial without Mr. Freeman's services. Code, §3525.

and many others which could be cited, to see any abuse of discretion in overruling the motion to continue on this

ground; and counsel really did not press it.

It was then renewed again, after all the evidence was in, and two arguments had been made, on the ground of the continued sickness of Mr. Freeman. A good deal of evidence was put before the court to show that he was the leading counsel, but the judge adhered to the opinion imbibed from the first oath of the defendant, that Mr. Cox was the leader, especially to make the argument, the thing which then remained to be done. Having witnessed the entire transaction in respect to the effort to continue; having full knowledge of the respective standing, skill-

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tact, ability and eloquence of the several counsel, we cannot say that, when the judge held that the man whom the defendant relied on as the leading counsel, was such in truth and fact, he thereby abused his discretion. case where there was but one counsel, and he much wearied and wasted with labor, so much so as not to have been able to prepare the case as he insisted, this court held that the presiding judge was better prepared to pass on the issue of continuance than this court, and left his discretion undisturbed. 54 Ga., 660. And in Cox vs. The State, where the defendant himself had been shot in the mouth, and had not recovered from it, and his inability to communicate distinctly and without pain to counsel on the trial was pressed as ground for continuance, this court, on the same ground of reluctance to interfere where the judge below had the discretion, and so much superiority over this court, from eyesight and immediate supervision, refused to intervene, and put the refusal on this reasoning. 64 Ga., 374.

The conclusion must be that this court cannot now say, on this case, so much stronger than those cited against the grant of the continuance, in view of all the shifts and turns and changes of scene under the eye of the court below, and of the three counsel besides Mr. Freeman, left to defend the prisoner, and of our own knowledge of the experience and ability of two of the three, to say nothing of the growing promise of the younger, that the court below so abused his discretion as to require us to condemn its exercise and reverse its judgment as abuse of law.

3: The 12th ground is rested, not on the admissibility of another indictment for murder against the defendant, in which the deceased was the prosecutor, but on the manner in which it was admitted and the confined view with which the jury was allowed to look at it, as involving expressions or intimations of opinion on the evidence. It appears that the court said, in ruling the indictment in as evidence, that "it is put in evidence for the fact that he

appeared as prosecutor, and for that evidence and that alone," and because, in charging the jury, the court repeated, "it is simply the isolated fact that he was prosecutor in that case, and in that case alone: that is all that the jury can consider in reference to that testimony." It appears from the general charge that the court confined them to the consideration of that indictment, to illustrate motive or malice towards deceased, and laid down the law clearly thereon. There is no legal expression or intimation of opinion about it—none of any sort, except to prevent the jury from using it, as they might have otherwise done, as evidence of the repeated homicides of the ac-Nothing was said to hurt, all to help, the prisoner. The jury were told that the presumption was the accused was innocent in that case, and they could only consider it to show motive.

4. The 13th ground of the motion has nothing objectionable in it when the facts in testimony are considered. A witness may give his opinion of the character of a man as dangerous or otherwise, if he has known him long—ever since the war.

Surely it is for the jury to determine when a witness is successfully impeached; if so impeached in their opinion, he should not be believed; if corroborated, he may be believed, and the corroboration may be by circumstances or other witnesses.

Section 4234 of the Code was inapplicable to the case. These embrace the heterogeneous complaints embraced in the 13th ground, with a re-hash of that embodied in the 12th.

5. The 14th ground embodies another set of objections or complaints equally untenable. Where one knows the character of a witness generally in the town where he once lived, he may testify as to that character for veracity though the witness has moved some four or five miles in the country, and the evidence should go to the jury, to be considered and weighed for its worth by them.

A charge that, "inasmuch as murder embraces the lower

grades of homicide, the defendant can not only be convicted of murder under the indictment in this case, if the evidence should authorize it, but if not guilty of murder, may be guilty of voluntary manslaughter, if the evidence require it," is the law. The word "require" was used merely to avoid tautology in repeating "authorize," and could not have hurt defendant, in all human probability, no matter where used in the charge; but where the language occurs in the opening of the case to the jury, as is the case here, it is impossible to conjecture how it could be so construed as to hurt defendant.

Whether the verdict was contrary to the charge complained of in this ground, depends on whether it was contrary to law because the evidence was insufficient to convict in reference to rules of law about reasonable doubts, the effect and weight of positive and negative testimony, and of assault by the deceased, etc. We do not see that it is not supported by the evidence on these points of law, ruled by the court and uncomplained of as law by the defendant.

6. The 15th ground is robbed of all sting by the judge's statement.

The prisoner's surety requested the judge to say to the sheriff, if the defendant was tried, that he desired to be relieved as soon as the trial commenced. This message was delivered, and after the motion for continuance was overruled, at the dinner recess, and before any of the jury were empanelled, the defendant was taken in custody by the sheriff on his own motion. This appears to us right, and does not show or certify anything like the complaint made by the defendant, that the court ordered him, while under bond, publicly in open court, into custody, and from that time until the end of the trial, he was kept under guards specially deputized for that purpose. It is not pretended that he was so in custody as not to have freedom of intercourse and consultation with his counsel.

7. In respect to other grounds, that counsel for the state

indulged in vituperation and abuse of the defendant, and made statements of facts outside of the evidence, it is enough to say that the record shows that the counsel was not interrupted by the defendant's counsel while so animadverting on the conduct of their client; and that it had been agreed between the concluding counsel on each side not to interrupt each other.

It is well settled in this court that unless the attention of the court be called to such lines of discourse, failure to stop counsel is not good ground for a new trial. 65 Ga., 525; 57 Ib., 42; 46 Ib., 26; 11 Ib., 629.\*

8. The last point is the partiality of certain of the jurors as alleged by defendant and undiscovered until after the trial.

On a careful examination of the affidavits pro. and conit seems to us clear that the judge committed no error in overruling the motion, so far as it rests on this ground. There is really nothing arising to the position of deserving serious comment except in the case of Jackson. A family by the name of Coleman, consisting of a man and wife and two daughters, swear to statements of his which, if true. would show bias and prejudice to such extent as to disqualify him; but bad feeling between the juror and this family is proved by the juror's own affidavit and that of his neighbors, and the motive to bring him into disrepute is alleged in his affidavit. He denies the language and all bias or prejudice of any sort; his character as an upright and truthful citizen is sustained and vindicated by quite an array of witnesses; and his fellow-jurors also all come to his rescue, and the fact is brought out that the only disagreement was but trifling and brief and related to the penalty only in which he seems to have taken no more active part than the others. It must be borne in mind that the rule is well settled that, if it be witness against witness, a new trial on this ground is never granted;

<sup>\*</sup>Contrast Cleveland Paper Co. vs Banks (Nebraska, S. C., Oct. 9, 1883), Alb. L.J. Vol. 28, p. 363. (Rep.)

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because oath balances oath. Here, it is true, there are four, but it is one family, on one occasion; nobody else present by whom to contradict them, and bad feeling existing. This, in connection with the sustaining depositions, makes such a case as does not per se disqualify the juror, and the depositions of his fellow-jurors turn the scales decidedly in favor of his own solemn and repeated oath of impartiality; and when to this is superadded the fact that he did not know personally, or very slightly if at all, either the accused or the deceased, it would appear that the trial was fair, so far as his impartiality was necessary to render it so. 5 Ga., 139; 14 Ib., 712; 15 Ib., 544; 17 Ib., 512; 11 Ib., 616; 38 Ib., 296; 43 Ib., 238, 516; 45 Ib., 279; 58 Ib., 577; 61 Ib., 182; 68 Ib., 696.

In view of the whole case, we do not feel at liberty as a reviewing court to reverse the judgment and set aside the verdict.

The testimony furnishes abundant evidence to support the verdict; the presiding judge is satisfied with it; the charge is apposite, clear and full; and though the penalty be capital punishment, it is inflicted under the law by a jury of the vicinage, upon facts fully investigated, and from which the truth of the case was elicited by them.

Disregard of human life is too common everywhere; the use of the deadly weapon, too frequent; and while no man should suffer, if innocent; if guilty, none should escape.

Judgment affirmed.

TRUSTEES OF CHESTER CHURCH vs. BLOUNT, executor.

 Ejectment was brought by certain persons as trustees of a church; the defendant died; when the case was called, his executor, though a year had not elapsed, was voluntarily made a party; during the trial, counsel for plaintiffs stated that a deed made to the church, or former trustees thereof, had been supposed to be lost, but had been found by the deceased defendant, and was in possession of Trustees of Chester Church re. Blount, executor.

counsel for defendant; he introduced a witness who swore that the deceased defendant had told him about a year previously of the finding of the deed, and charged him to keep it secret, which he had done until since the trial began; counsel for plaintiffs moved to require counsel for defendant to deliver the deed; the court refused to do so, or to require counsel for defendant to answer questions as to his possession; plaintiffs then moved for a continuance to give time for a notice to produce; it was refused:

Held, that this was error. Wherever a paper is in court belonging to one party and surreptitiously secured and secreted by the other, and handed to counsel, not to prepare a legitimate defence by the use of a link in the title, but to keep under cover of privilege and confidence, semble that its instant delivery to the party to which it belonged should be ordered.

2. If notice to produce was necessary, a continuance should have been allowed to give time for that purpose. Under the facts, the plaintiffs were not in *laches*. The defendant had died; his executor had just been made a party; counsel had just learned of the possession of the deed.

a.) The deed desired was good as color of title to support prescription, whether made to trustees or the cestui que trust.

September 18, 1868.

Practice in Superior Court. Attorney and Client. Continuance. Before Judge Bower. Decatur Superior Court. May Term, 1883.

Reported in the decision.

- D. A. Russell, by J. H. Lumpkin, for plaintiffs in error.
- O. G. GURLEY; J. E. DONALDSON, for defendant.

JACKSON, Chief Justice.

In the view we entertain of the law, it is unnecessary to consider but one of the exceptions to the rulings of the court, and that is based on the refusal of the court to continue so as to enable the plaintiffs to give notice to defendant and his counsel to produce the deed.

The facts on the point are, that the deed had been lost, vas over thirty years old, and had been found by defend-

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ant, and was then in possession of his attorney, Mr. (†urley, and plaintiffs had just received information of the fact of its being found and in possession of the other side.

Plaintiffs moved that the paper be surrendered by the said counsel, and proposed to ask him whether he had it. James English was introduced as a witness on this motion. and testified "that about a year ago Jacob Blount (who had been the defendant) told him he found the Chester church deed among the old papers of Jesse L. Collins,. now deceased, and told witness to say nothing about it, but keep it a secret. Witness never told any one about it until since the beginning of this trial. Mr. Blount said' it was an old deed from Stephen Swain to the Chester Church." The court denied the motion to produce the deed or interrogate the counsel as to his possession of it. Thereupon plaintiffs made a motion to continue in order to serve notice on defendant and his counsel to produce the paper. The executor of Blount, who had died since the last term, was made a party by consent that day on the call of the case.

1. We hardly think that the facts in the case at bar come up to the ruling of this court in Dover vs. Harrell, 58 Ga., 572, and therefore, are inclined to the opinion that counsel should have replied to the question as to his possession of the deed, and if he had it, should have been directed to produce it. In Dover vs. Harrell, the grant which the counsel was forced to produce was a title paper of the client which had been entrusted to the counsel "to prepare his defence." In the case at bar the deed was a deed to the plaintiffs, belonging to the church, and. which the defendant had got from the effects of a dead man, doubtless a trustee or officer of the church, which the defendant had secreted with the fraudulent intent not to divulge that it had been found, which was no muniment of title to him, nor confided to his counsel to prepare his defence. It was a naked effort to deprive his adversary of a paper which belonged to it, and to which it had. Trustees of Chester Church vs. Blount, executor.

the exclusive title. It was a fraud to secrete it, and no less a fraud to withhold it.

Wherever a paper is in court belonging to one party and thus surreptitiously secured and secreted by the other and handed to counsel, not to prepare a legitimate defence by the use of a link in the title of the party, but to keep under color of privilege and confidence, we rather think good law, as certainly good morals, would demand its instant delivery to the party to which it belonged.

2. But let that pass. It is quite clear that the plaintiffs were in no lackes in respect to notice to produce the deed. They had no reason to believe or suspect that their adversary had it hid. They were informed of it on the trial. They proved it by a witness. If in court, in the pocket of party or counsel, it should have been disgorged, as intimated above; if not, or if notice to produce it were necessary because of extreme regard to the privilege of counsel and the confidence of his client in him, then the case should have been continued, so as to serve the executor of the man who secreted the paper or his counsel, or both, with notice to produce it.

The executor was just made a party, and could not have been served with notice before, even if the fact had been known; but the information was just received, and too late to give the notice in the time required by law. It is too plain for further discussion that the continuance ought to have been granted. The deed was all important. It was good color to support prescription, whether to trustees

1to cestui que trust, to former or present trustees, their successors, or to the Chester Church.

It is bad enough for a man to lose rights by such conduct; it is worse, infinitely worse, for a church, a society for the worship of God according to conscience, to lose its place of worship thereby.

Judgment reversed.

# Wimberly et al es. Mansfield et al

# WIMBERLY et. al. vs. MANSFIELD et al.

- 1. After an action of ejectment has been brought, and the declaration filed, if it becomes necessary to perfect any muniment of title or link in its chain by a proceeding in another court to alter, amend or add to the records thereof touching such muniment or link, notice should be given to the adverse party; and if it appear that the order nunc pro tunc was taken without such notice, the exemplification thereof should be rejected as evidence in the ejectment case.
- 2. If, pending an action of ejectment, an order nunc pro tunc was obtained from the court of ordinary affecting the title involved in the ejectment case, when in fact there had never been a precedent order granted at all, and this was done ex parte and without notice to the adverse party in the ejectment cause, such judgment would be one obtained by fraud, and could be collaterally attacked when offered in evidence.

September 18, 1883.

Practice in Superior Court. Notice. Evidence. Judgment. Fraud. Before Judge Bower. Calhoun Superior Court. March Term, 1883.

Wimberly et al., as heirs of Griggs, deceased, brought ejectment against Mansfield, as real claimant, and Ruth, as tenant in possession. Plaintiffs claimed under their father, Griggs, who died in possession. Defendant, Mansfield, claimed by a chain of conveyances under one J. J. Sessions, as administrator of Griggs, who sold the lot at administrator's sale.

Defendant, Mansfield, offered in evidence an exemplification of the record from the court of ordinary of Calhoun county, showing an order of that court purporting to establish an order granted by it in 1868, authorizing the sale of the land by the administrator. This nunc pro tunc order was granted on the petition of L. C. Hoyl, Esq., administrator of Sessions, deceased, who had been the administrator of Griggs. It was granted in March, 1883, after the commencement of this action of ejectment, and without any notice to the plaintiffs. They objected to it, one

# Wimberly & al. vs. Mansfield & al.

ground of objection being this want of notice. The objection was overruled.

Plaintiffs then introduced witnesses and proposed to prove that there had been no such original order, that no order was granted for the sale, and it took place without order. This testimony was rejected on objection.

The jury found for defendants. Plaintiffs excepted, and assigned as errors, among other things, the following:

- (1.) The court erred in admitting in evidence the exemplification from the court of ordinary.
- (2.) The court erred in rejecting the evidence offered to show that there was no original on which to base the nunc pro tunc order.
  - L. G. CARTLEDGE; C. B. WOOTEN, for plaintiffs in error.
  - J. J. BECK, by A. HOOD, Jr., for defendants.

# Jackson, Chief Justice.

The only questions in this case necessary to be decided are whether, pending an action of ejectment in which an order to sell in the court of ordinary is a necessary muniment of title and there is no evidence of such an order of record in that court, the party wishing to use such evidence can have a nunc pro tunc order entered without notice to the other side in the ejectment cause, and whether, in such a case, the party not served with notice of the nunc pro tunc order can attack the same as fraudulent in the superior court, on the ground that no such original order to sell ever was had in the ordinary court and the whole proceeding was fraudulent and void.

1. We think that when the parties are at issue in ejectment in the superior court,—that is, after the action is brought and the declaration filed,—and it becomes necessary to perfect any muniment of title or link in its chain by a proceeding in another court to alter or amend or add to the record thereof touching such muniment or link, fair-

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ness and the prevention of fraud demand notice to the adverse party; and if it appear that the order nunc pro tunc was taken without such notice to the adverse party, the exemplification should be rejected as evidence.

In the case of Cleghorn vs. Johnson, and rice-versa, 69 Ga., 369, this court ruled, in respect to the establishment of a lost paper, that the usual practice was to establish it instanter, on motion and without notice; but that, where the lost paper is a part of a muniment of title in ejectment pending in another court, and a material link in the chain, the better practice is to give notice of the proceeding to establish the lost paper to the other party in the ejectment. The practice there indicated as proper, we now rule to be necessary; and rule that an exemplification of such record without notice is not admissible.

2. Moreover, a judgment obtained by fraud may be attacked anywhere, when it stands in the path of the rights of any litigant; and if it can be shown that no original order to sell ever was passed by the court of ordinary, and that an order nunc pro tunc was obtained when there never had been a precedent order granted at all, and that this had been all done ex parte and without notice to the other party in the ejectment suit, and with a view to make a title and win the case, which could not otherwise be gained, we can conceive of no more fraudulent proceeding to procure a judgment, and none therefore on which an attack collaterally should have been more readily allowed. Of course we do not say whether the facts can be proved or not. It is enough that the plaintiff in error proposed to prove them, and the court refused him the privilege to try to do so. Code, §3596.

The admission of the exemplification of the nunc pro tunc judgment of the court of ordinary, making a record after the action of ejectment was brought, without notice to the other side opposed to the necessary link of title so made, and which did not exist at the commencement of Masland, Jr., d ux. vs. Kemp d al.

the suit, and the refusal to permit the plaintiff in error to assail the *nunc pro tunc* order or judgment of the court of ordinary for fraud, in our judgment necessitate the grant of a new trial.

Judgment reversed.

# MASLAND, JR., et ux. vs. KEMP et al.

- Where evidence is brought up as exhibits attached to the bill of exceptions, and following the certificate of the presiding judge, such exhibits must be identified by the signature of the judge. If the exhibits be not so identified, and the facts are necessary to an adjudication of the questions made, the writ of error will be dismissed.
- (a.) Where exception is taken to the dismissal of a bill in equity on the pleadings and evidence after the testimony was closed (in the nature of a non-suit at law), the entire evidence is essential.
- Exception to the refusal of a continuance because parties had not been served, if the question of lackes of the complainant in not having service made was involved, cannot be determined by this court without all the evidence on the subject of lackes.
- 3. Whether the court erred in requiring complainants to elect whether they would pursue money or property, would depend on the case made, not only by the pleadings but also by the proof—the whole case made; and to adjudicate it, the evidence is necessary.
- To decide whether the admission or rejection of testimony was error, the other testimony is necessary.
- 5. An exception to the ruling on demurrer to a bill, plea, or the like, may be heard without the evidence in the case, because the record presents the whole case on the point, and aliunde facts cannot be considered. In all other cases the evidence must be incorporated in the bill of exceptions or exhibited thereto (no motion for new trial being made). If the exhibits be before the judge's certificate, they are embraced therein; if they come after the certificate, each must be identified, as required by the 10th rule of court, as stated in 38 Ga., 689; 61 Id., 402.
- 6. A bill of exceptions with the certificate is the writ of error, and must be certain, especially as to evidence. There should be no interlineations in it at all, unless specially certified by the judge, as an interlineation in a deed must be before the witness attential it; but if interlined at all, certainly it should be done so as to be read. Bills of exceptions must be plainly written without interlining, or hereafter counsel must suffer the consequences.

September 25, 1883.

## Masland, Jr., et uz. re. Kemp et al.

Practice in Supreme Court. At September Term, 1883.

The bill of exceptions in this case shows that Masland et ux. brought a bill against Kemp et al., attacking a sheriff's sale and claiming both the land and the money arising therefrom. At the October term of court, 1879, all parties not having been served, an order was taken to perfect service. At the April term, 1883, of court, the case was called for trial; the attorneys for complainants moved for a continuance, because parties had not been served. The presiding judge certified that no diligence was shown, and the motion was overruled. Complainants then struck the party not served, and proceeded against the others.

The court required complainants' counsel to elect whether they would pursue the land or the money. They elected to pursue the money. (The court certified that he did not know the reason that moved counsel to make this election without objection, but they did so.)

Evidence was then introduced, partly documentary and partly oral. This is referred to as being contained in exhibits A, B, and C. After the certificate of the judge, appeared what purported to be exhibits A, B, and C. They were not identified by the signature of the judge, and were a confused mass of parol and documentary evidence. There was much blurring and interlineation.

Certain testimony was offered by complainants, and rejected.

At the close of the complainants' case, the court dismissed the bill, in the nature of a non-suit. Complainants excepted, and assigned error in each of the rulings above stated.

- H. Morgan; W. E. Smith, for plaintiffs in error.
- D. H. POPE, for defendants.

JACKSON, Chief Justice.

1. A motion was made to dismiss this bill of exceptions

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on the ground that the exhibits to it were not identified The law requires this identification. 61 by the Judge. Ga., 492; 13 Ib., 495; 38 Ib., 689, containing 10th rule of this court. The judge's name does not appear on any exhibit, as the rule of court prescribes, and as was done in the case in the 13th, and as is laid down distinctly in the 61st, p. 494, where the exhibit follows the judge's certificate, as it does in this case. Besides, part of what purports to be exhibits is oral testimony on the stand, not interrogatories: and which is not marked at all as an exhibit. Moreover, the executions levied, and which purport to have sold the property and brought the money which complainants sued for, and which on their face showed its distribution by the sheriff before the application for an injunction, are not marked or identified by any reference at all to them, except in a blurred and blotted interlineation over what is alluded to as exhibit B, and these papers come after exhibit C, thus cutting in two exhibit B, if ever part of it.

It is clear, therefore, that, under no possible view of the case under the law, can this writ of error be retained, if the facts be necessary to an adjudication of the questions made. On the point of the dismissal of the case, which is the main error assigned, on the pleading and evidence after the testimony was closed, the entire evidence is essential, and this point, called erroneously a non-suit, as at law, in the bill of exceptions, could not possibly be reviewed without all the evidence.

2. But it is said that the motion to continue, on the ground that parties had not been served, was good and could be heard without testimony aliunde. It will be seen, however, in a moment that it could not be. Suppose that the judge held that the party's lackes in not having the other parties served caused the ruling, the testimony as to that lackes would be necessary to adjudicate the propriety of the refusal of the motion.

Besides, the record shows that one of the parties alleged

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not to have been served, the clerk who acted as administrator of McGuire's estate, made answer to the bill, and appearance and answer waive service; and the record also shows that the only other party alleged not to have been served, Mrs. Elizabeth McGuire, was not made a party by subpœna at all until the term of trial, by amendment, and that to go upon property in her possession and not for money, for which complainants elected to go on the trial. As to that issue she was not a necessary party, and when that election was made, the bill was dismissed as to her. So that, even if the motion to continue could have been heard without the evidence as to laches, it could not have been granted, and would have availed nothing in this court.

- 3. It was insisted, however, that the exception to the court's ruling on the point to elect whether complainants would go for money or property could be heard without evidence. That point is that the judge forced the election, and erred in so doing. Whether he erred or not in so doing, would depend on the case made, not only by the pleadings, but by the proof—the whole case as made; therefore, to adjudicate that, the evidence is necessary. Besides, the judge, in amending the bill of exceptions, says: "I don't know the reasons that moved plaintiffs to make this election without objection; only know they did so," thereby not verifying the bill of exceptions on this ground of error.
- 4. The others are exceptions to the introduction of testimony or ruling out the same. To decide whether right or wrong, the other testimony is absolutely necessary. The same evidence may have been in, and the party not hurt, or on a view of all that was in, something may have appeared in other evidence that made that offered admissible or not.
- 5. In view of the whole case, we are clear that it should be dismissed. A demurrer to a bill, or plea, or something of that sort, may be heard without the evidence in the

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case; because the record presents the whole case on the point, and there can be no aliunde facts to be considered. In all other cases, the evidence must be incorporated in the bill of exceptions or exhibited thereto. If that exhibit be before the judge's certificate, which is the writ of error, it is embraced within that certificate; if exhibits come after the certificate of the judge, each must be identified according to rule 10 of the Supreme Court, to be found in 38th Ga., 689, and the decision thereon in 61 Ga. 492.

6. Even if reference to the exhibits as A, B, C, D, etc., would suffice, if made in the body of the bill of exceptions and in the judge's certificate, all allusion to the exhibits in this bill is so blurred and blotted, besides obscurely interlined, that it is extremely difficult and uncertain, if not impossible, to make out the meaning of the reference. A bill of exceptions with the certificate is the writ of error. and must be certain, and certain especially as to evidence. There should be no interlineations in it at all, unless specifically certified by the judge, as an interlineation in a deed must be before the witness attesting it; but if interlined at all, certainly it should be done so as to be read. Counsel prepare the bill of exceptions themselves; the clerk of court has nothing to do with them; and these bills of exception must be plainly written without interlining. or hereafter counsel must suffer the consequences.

Writ of error dismissed.

# SELLARS vs. CHENEY, administrator.

## [Blandford, Justice, did not preside in this case.]

 When a defendant in an action of complaint for land puts in the defence, he must admit possession.

 Section 2486 of the Code applies only to suits by an administrator against heirs, or those holding under them; not to a suit by a stranger.

3. That an administratrix stood by and saw property of the inter-

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sold under a void for far will not esting the administrator or house now who succeeded her from attacking the validity of the sale.

- 'a.' Code, 1996; 59 Ga., 171 are not applicable.
- 4. A constable who served a summons, and a justice of the peace succeeding the one who issued it in that office, may prove and identify it; the justice who issued it need not be called.
- 5. Where a summers in a justice's court, based on a claim for more than fifty dollars was issued in 1876, and called upon the defendant to appear within less than twenty days, the judgment rendered, the £. fa. issued thereon, and the sale made thereunder were void. That the court continued the case, and rendered the judgment more than twenty days after the issuing of the summons, did not render the proceeding valid.
- In complaint for land, where plaintiff and defendant both hold under a common grantor, the title in him need not be proved.
- 7. The verdict is right.

#### September 25, 1888.

Administrators and Executors. Ejectment. Estoppel. Justice Courts. Judgments. Nullities. Before Judge Fort. Schley Superior Court. March Term, 1883.

Mrs. Ingraham, as administratrix of Ingraham, deceased, brought complaint for land against Sellars in 1881. During the pendency of the case, she married and her letters abated. Cheney administered and was made a party. On the trial plaintiff introduced a deed from one Hightower to Ingraham, dated in 1850, proved possession in the decedent from 1854 to 1874, when the latter died, showed plaintiff's letters of administration, introduced evidence o mesne profits, and closed.

Defendant moved for a non-suit, which was refused.

Defendant introduced a sheriff's deed, covering the premises in dispute, dated March 6, 1876, made under a justice court fi. fa. against Mrs. Ingraham, as administratrix. He also proved that Mrs. Ingraham was present and made no objection to the sale.

Plaintiff then introduced the record of the justice court suit on which the f. fa. against the administratrix was founded, and the justice court docket, proving the same by

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the constable of the justice who succeeded the one rendering the judgment. From these it appeared that the summons was issued on February 26, 1876, and called on the defendant to answer on March 11, although the amount in suit was \$51.53; that the case was continued until March 18, when judgment was rendered by default. It was admitted that the tenants of Sellars had been in possession since the commencement of the suit, but that Sellars himself had not been so.

The jury found for the plaintiff the premises, with mesne profits. Defendant moved for a new trial, on the following among other grounds:

- (1.) Because the verdict was contrary to law and evidence.
- (2.) Because the evidence did not show that the defendant or his tenants were in possession at the time this suit was brought.
- (3.) Because the court admitted the justice court summons without proof from the justice who issued it. [The proof was by his successor and the bailiff.]
- (4.) Because the court failed to charge anything as to estoppel arising out of the presence of the former administratrix at the sale under the ft. fa. and her failure to object thereto.
  - (5.) Because the court refused to grant a non-suit.
- (6.) Because the court admitted the deed from Hightower to Ingraham, it appearing that the signature of the attesting justice was in a different ink from other parts of the deed.
- (7.) Because the court held that if the justice court summons was returned in less than twenty days, it and the sale thereunder were void.
- (8.) Because the court held that the suit could be brought against the owner and not the tenant in possession.

The motion was overruled and defendant excepted.

#### Sellars vs. Chency, administrator.

- B. B. HINTON, for plaintiff in error.
- B. P. Hollis, for defendant.

Jackson, Chief Justice.

The questions made in this record and pressed here mainly by the plaintiff in error are, first, that possession in defendant in the ejectment case was not proved; secondly, that the administrator could not sue unless he brought himself within section 2486 of the Code, and showed either prior possession, or that the recovery was necessary to pay debts or make proper distribution; thirdly, estoppel; and fourthly, the evidence necessary to prove and identify a summons to a justice court so as to admit it in the evidence.

- 1. When the defendant put in his defence to the action, the law and rule of court required him to admit possession.
- 2. Section 2486 of the Code, applies to suit by the administrator against heirs or those holding under heirs. Sellars, the defendant here, was neither an heir nor did he hold under one.
- 3. The estoppel is not good under the facts. It is based on the idea that the former administratrix stood by and saw the sale under the void f. fa., and thereby the administrator de bonis non is estopped from attacking its invalidity. Even if an administrator sells illegally as an individual he is not estopped as administrator; certainly then he will not be, if the preceding administratrix sees the sheriff sell illegally and says nothing. 57 Ga., 425; Section 2966 of Code, and 59 Ga., 171, are not applicable.
- 4. The constable who served the summons, and the justice of the peace who succeeded him who issued it in that office, may prove and identify it, and the justice of the peace who issued it need not be called. The constable who served it certainly knew as much about it as the justice who issued it for service.

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- 5. The justice court was illegally held, under the constitution of 1868, and the judgment and fi. fa. and sale were void; the court being held not in the time prescribed by lsw, was no court. 56 Ga., 283; 59 Ib., 533, 603; 60 Ib., 631, 466; 65 Ib., 557.
- 6. Where plaintiff and defendant both hold under a common grantor, the title in him need not be proved. 54 Ga., 689; 55 Ib., 613.
  - 7. The verdict is right.

Judgment affirmed.

## MASSEY vs. COTTON STATES LIFE INSURANCE COMPANY.

[Hall, Justice, being disqualified, Judge Hutchins, of the Western Circuit, was designated to preside in his stead.]

An insurer obtained from a life insurance company an ordinary life policy, the character of which plainly appeared in print, both on the margin and in the body of such policy; he paid the premium thereon for ten years, but when called on for the eleventh annual premium, he filed a bill against the company, alleging that its agents had represented to him, and he believed, that his application was for a ten year paid-up policy, when in fact it was for an ordinary policy; that the company issued and delivered to him an ordinary life policy when he believed it to be a ten year paid-up policy; complainant sought to compel the issuance of a paid-up policy, or to rescind the contract and recover the premiums paid by him:

Held, that by the use of reasonable diligence he could have had knowledge of the truth, and equity will not relieve him against the results of his own gross neglect.

November 6, 1888.

Insurance. Contracts. Equity. Negligence. Before Judge Simmons. Bibb Superior Court. April Term, 1883.

Reported in the decision.

GUSTIN & HALL, for plaintiff in error.

LANIER & ANDERSON, for defendant.

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## BLANDFORD, Justice.

The plaintiff complains because the court below granted a new trial in this case. He makes this case: The agent of the defendant represented to him that his application was for a ten years paid-up policy, and he believed that the same was in fact for such policy in defendant's company, when in fact it was for an ordinary life policy; that the company issued and delivered to him a policy for an ordinary life policy, when he thought and believed it to be for a ten years paid-up policy; that he paid the premium due on said policy for ten years, all the time believing that it was a ten years paid-up policy; that when called on for the eleventh annual premium, he discovered that the policy which had been issued to him ten years before was only an ordinary life policy, although it was plainly stated in print on the margin, "ordinary life," and so in the body of the policy. He filed this bill to compeldefendant to issue a paid-up policy to him, or to rescind the contract, and decree that the money which he had paid defendant for premiums be paid back to him.

The question in this case is, could the plaintiff, by ordinary diligence, have discovered the truth as to the representations of defendant's agent? If he could, then he is too late with his bill. The policy which he received put him upon notice as to its character, and whether it was an ordinary life policy or a ten years paid-up policy. Code, section 3126. "If a party, by reasonable diligence, could have had knowledge of the truth, equity will not relieve."

Nothing but gross negligence could have kept the plaintiff in ignorance of the truth in this case, and in such case the inference is the plaintiff acquiesced in the action of the defendant and accepted this policy as it is, and waived the policy which he originally wished to have issued to him. If the plaintiff could not understand or fully comprehend the nature of the policy issued to him by defendant, then, as an ordinarily prudent man, he should have

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made inquiry of some one who could have informed him as to its character and nature. Having failed to do this for eleven years from the time the policy was issued to and received by him, equity will not relieve him for such gross neglect. *DeGive vs. Healy*, 60 *Ga.*, 395; 56 *Ga.*, 161; 60 *Ib.*, 449.

Applying these principles to the case before us, it was not error to have granted the new trial in this case.

Judgment affirmed.

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- 1. Where, after the death of a land-owner, his estate, which was of less value than \$500.00, was set apart as a year's support for his widow and three children by her, without mentioning two children of the decedent by a former marriage, and the persons to whom the year's support was so set apart took exclusive possession of the property under claim of title, this constituted a severance from the other children, and a prescriptive title began to run; and if that claim, accompanied by such possession, was continuous, adverse, open, notorious and peaceable for the statutory period after the excluded children became of age, then the prescription ripened into a perfect title, unless it originated in fraud to which the claimants were parties, and which was kept concealed from the adverse parties without laches on their part.
- (a.) Adverse possession against a co-tenant may begin to run after actual ouster, or exclusive possession after demand, or express notice of adverse possession.
- (b.) Although the proceedings may have been irregular, the judgment purporting to vest the title in the applicants for a year's support was color of title on which prescription could be based.
- (c.) Fraud will not be presumed from the mere omission from the proceedings of the names of some of the children who lived with their grandparents, and for whose support provision had been made by the decedent.

JACKSON, C. J., concurred.

BLANDFORD, J., dissented.

November 13, 1883.

Year's support. Color of Title. Prescription. Judgment. Before E. Womack, Esq., Judge pro hac vice. Pike Superior Court. October Term, 1882.

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Reported in the decision.

- J. S. POPE; W. S. WHITAKER, for plaintiffs in error.
- E. F. DUPREE; JOHN I. HALL, for defendants.

HALL, Justice.

Dunn died, leaving a widow and five minor children; two of these children were by a former marriage, and had been consigned by the father, in his lifetime, to the care and protection of their maternal grandfather. It is alleged that they belonged to the grandfather's family at the death of the father, that he had provided out of his slender means for their support in that family, and had given up all parental authority and control over them, and consequently that they were not a portion of his family at the time of his death.

His estate, at his death, was not worth \$500. widow applied to the ordinary of Pike county, to set apart a year's support for herself and three minor children. Upon this application, commissioners were appointed, who valued the entire estate at less than five hundred dollars. and it was set apart to the widow and her minor children. No schedule of the property thus set apart was returned. but notwithstanding this, the court of ordinary, by its judgment rendered upon this return, allowed it as a year's support to the widow and her minor children. Under this judgment they took possession of it, used it exclusively as their own, receiving its income, paying taxes on it, and accounting to no one for it or its proceeds; they put improvements upon it, and continued in the exclusive use and enjoyment of it for about fourteen years without interruption or counter-claim, when the present bill was brought by the children of the former marriage for a partition of the land thus set apart, against the widow and her children. To this bill the defendants pleaded the statute setting up their prescriptive title to the premises, claiming that the

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suit was not brought until more than seven years had elapsed from the date when the youngest of the complainants had attained her majority. The evidence fully sustained this latter fact; indeed it was not contested. Under the charge of the judge pro hac vice presiding in place of the judge of the circuit, a verdict was found in favor of the complainants, and the defendants moved to set it aside and asked for a new trial upon various grounds, which was refused, and exception was taken to this judgment refusing the new trial, and brought here by writ of error.

In our view, it is not material to notice any other ground than that relating to the defendant's claim of a prescriptive title. The charge excepted to will be found in the 12th and 13th grounds of the motion, and is as follows: "If the jury believed, from the evidence, that Catherine Norris (formerly Dunn), one of the defendants in the case, and her three minor children went into possession of the land in dispute under a setting apart of the same as a year's support to them, whether the setting apart was legal or not, and believed they had a right and title to said land by reason of its having been set apart to them as a year's support, and remained in continuous possession of the same for seven years after complainants became of age next before the filing of the bill, and that complainants had, on arriving at age, express notice of such possession and claim of title of said Catherine and children, then complainants would be barred from a recovery, and they should find for the defendants." At the verbal request of complainants' solicitor, made in the presence of the jury. who stated that "he did not understand the latter part of the charge," (as to express notice) "and did not think the jury did," the court repeated and emphasized the same, saving: "I charge you again, gentlemen of the jury, that in order for the statute of limitations to run in favor of defendants' prescriptive title, complainants must have had express notice of the possession and claim of title by the defendants, and that the statute of limitations would only

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begin to run from the time of such express notice to complainants. It makes no difference how they receive notice, but complainants must have had express notice."

Admitting that the complainants claimed to be tenants in common with the defendants, and that they were so in fact, at the death of Dunn, the husband of the widow and father of all the children, and were originally seized jointly with the defendants, and that the possession of the latter was that of the former,—that they held in subordination and not adversely to the true title, vet when there was a severance of this tenancy in common as between the widow and her children on the one side and the complainants on the other, as there unquestionably was by the setting apart of the premises to the said widow and her children as a year's support to the exclusion of the complainants, then the prescriptive title of the defendants commenced; and if this claim of title was accompanied by the exclusive possession of the defendants and that claim accompanied by such possession was continuous, adverse, open and notorious for the statutory period, then it ripened into a perfect title, unless it originated in a fraud to which the claimants were parties and which was kept concealed from the adverse party, who were vigilant in their efforts to discover it but failed to do so.

If there were no question of a joint right of possession in the case, these positions would not be questioned for a single moment. But how stands the law in case of tenants in common? The Code, §2303, will answer it. According to that, "there can be no adverse possession against a cotenant until actual ouster, or exclusive possession after demand, or express notice of adverse possession; in either of which events, the co-tenant may sue at law for his possession."

It is not pretended on the part of the defendants that they rely upon either of the two last conditions. They do not set up exclusive possession after demand; nor do they claim that they gave express notice to the complainants



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of adverse possession. They do insist, however, that the proceedings before the ordinary, coupled with exclusive possession, under the right thereby accruing to them, for the time required by law, was an actual ouster, and that when the court charged that express notice was essential to the perfection of their claim, he charged upon a different case from that made by the pleadings and proof, and withdrew from the consideration of the jury the only question upon which they rested their right as against the complainants; that so far from assisting the jury to reach a correct conclusion, this charge misled and diverted them from the proper field of inquiry and investigation. Whether they are right or not, will depend upon what amounts to an actual ouster.

In Doe, ex dem. Horne, vs. Roe & Howell, 46 Ga., 9, this court held that "where a tenant in common conveyed the whole lot to a third person, and the grantee took possession, claiming the entire lot as his own, this action constitutes a disseisin and ouster of the other tenants in common, and they are barred from asserting their right to such property after the expiration of seven years." See also Freeman's Co-tenancy, §224, and the numerous cases cited in note 2 there. In Prescott vs. Nevers, 4 Mason C. C., 330, the rule is thus laid down by Story, J.: "I take the principle to be clear that, where a person enters into land under a claim of title thereto by a recorded deed, his entry and possession are referred to such title."

In this case it may be said there is no recorded deed; but the defendants rely upon something equally as potent, viz.: the judgment of a court of competent jurisdiction, purporting to vest the title in them. In Clymer's Lessee vs. Dawkins et al., 3 Howard, 688, the plaintiffs relied upon the fact that the defendants derived their title from a judgment of partition, which was alleged to be absolutely void; certainly the plaintiff in the suit (one of the original co-tenants) was no party to the proceeding for partitioning the land. The court, however, said in reply to this objection, that "it was wholly unnecessary to decide

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whether those proceedings were absolutely void or not; for, assuming them to have been defective or invalid, still, as they were matter of public notoriety, of which Clymer, the plaintiff, was bound, at his peril, to take notice, and as Lynch and Blanton (his original co-tenants) under those proceedings claimed an exclusive title to the land assigned to them, adversely to Clymer, if the defendants entered under that exclusive title, the possession must be deemed adverse, in point of law, to Clymer." Again, Ib., p. 689, it is said: "When some notorious act of ouster or adverse possession, which is brought home to the notice or knowledge of the other co-tenants occurs, the possession is, from that period, treated as adverse to the other tenants, and it will afterwards be as operative against them, as if the party had entered under an adverse title. Now such a notorious ouster or adverse possession may be by any overt act in pais, of which the other tenants have due notice, or by the assertion, in any proceeding at law, of a several and distinct claim or title to an entirety of the whole land, or, as in the present case, of a several and distinct title to the entirety of the whole of the tenant's property under a partition, which, in contemplation of law, is known to the other tenants." The learned Judge Story, delivering this opinion, deems this doctrine so familiar that it seems scarcely necessary to cite any authorities. He does, however, cite quite a number of cases, both English and American, in its support, beginning with Townsend and Pastor's case, 4 Leonard's R., 52, and continuing the list down to 1845, the time of the decision he was then rendering. These citations need not be repeated here. they are set out and commented upon in the opinion from which we have quoted. Since that time there have been others affirming and enforcing the same principle. man's Co-tenancy, §227.

If the foregoing cases lay down the law correctly, of which we entertain no doubt, they effectually dispose of the one at bar. Indeed §2303 of the Code announces, in

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a brief but accurate and comprehensive form, the identical doctrine, and gives the rule by which we must be guided to our conclusion.

We cannot infer fraud from the bare fact, that the names of the complainants do not appear in the proceedings before the ordinary to have the year's support set apart. The court may have been apprised of all the facts, and may have deemed it unnecessary, under the circumstances of the case, to make provision for them, as that had been done in the lifetime of their father.

Judgment reversed.

JACKSON, Chief Justice, concurring, said: I concur in the judgment. On the death of the decedent, the title descended to the widow and all the children, and they were then all tenants in common. But the law allows the widow to apply for and have set apart a year's support for herself and the children of the decedent, and this court has held that the widow may sell the property set apart for a year's support, and use it up for the benefit of the family. So that, if the judgment of the ordinary was wrong, it at least gave color of title; and if, instead of using up the property, it was held under the judgment for the statutory time, a prescriptive title ripened. I am inclined to think that the judgment of the ordinary vested the title in widow and children named therein; but if, because of irregularity or otherwise, it did not vest the title in them, it at least purported so to do, and was therefore color of title; and with such possession as the statute prescribes, a prescriptive title could be based thereon.

# Blandford, Justice, dissenting:

The question in this case is, does the setting apart of a twelve months support to a widow and certain minor children of her and her deceased husband, by the ordinary, vest the property in such widow and children to the exclusion of other minor children of the deceased husband

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to such an extent as to make such setting apart by the ordinary color of title in favor of the widow and her children named in the application to the ordinary, which, with possession of the property for the statutory period, will bar the other minor children of the husband by a former wife.

I maintain that the setting apart of the property by the ordinary for a twelve months' support was not a judicial but a ministerial act, unless objections to the return of the commissioners had been made, and when the ordinary passed upon the objections this action was judicial, not ministerial, and unless objections be filed there is no plaintiff and defendant before the court—no case; so that the mere filing and recording of the returns of the commissioners as provided by \$2573 of the Code, by the ordinary, are merely ministerial acts, such as were done by the ordinary in the present case. The object of all the provisions of the statute is to provide for the widow and all the minor children of the deceased husband for twelve months after his decease, so that creditors of the husband shall not deprive the widow and children of this support from the husband's estate.

Under the laws of this state, when a person dies his real estate descends to his heirs at law, subject to be sold by his administrator for the payment of his debts, as personal property is, and all of his children inherit equally per capita. But this rule of descent is changed when property has been set apart to the widow and children of the deceased husband. Then the same vests in and becomes the property of the widow and all the minor children of the deceased husband, whether the children be by a former wife or not; and if there should be adult children, they will not be entitled to any part of the property so set apart though it may be the whole of the property left by the deceased ancestor. Thus it is as to the property set apart; another rule is adopted as to the distribution of intestates' estates. Until the property is so set apart, then the gen-

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eral rule of distribution applies; but immediately after the property is set apart, then the same vests in the widow and all the minor children of the deceased husband. Code, §§2574, 2576.

What relation do the widow and minor children sustain to each other as to the property set apart? That they are tenants in common as to this property all admit, and no one can doubt. The law casts the title, by the act o the ordinary setting apart the property, upon the widow and all the minor children of the deceased husband. Those children by a former wife, if they be minors, take, under the law, equally with the children by the last wife, they are tenants in common as to such property set apart. The application made to the ordinary being by the widow for herself and her three minor children, there being no mention of the two minor children by a former wife of the husband, and the setting apart to the applicant, by the ordinary, did not change the law. When this property was set apart by the ordinary, the law came in and vested the same in the widow and all the minor children of the de ceased husband, those left out of the application as well as those embraced therein. This was the force of the law. and no act of the widow or ordinary could break or impair this force of the law; so that the widow and her children took this property upon the same terms, to the like extent, and no more, as the two minor children of her deceased husband whose names were left out of the application. Such was the operation of the law, and when the widow with her children went into possession of this land set apart, as aforesaid, her possession was the possession of all the children of her deceased husband; they were tenants in common; they held this land per my et per tout. and all the relations and the law regulating or applying to tenants in common applied to these parties,

This widow went into possession of this land with her children under the setting apart by the ordinary; she then became a tenant in common with the other children of her

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deceased husband; her possession was their possession; she did no act save to go into and enjoy this property, which she had a right to do; and this was not inconsistent with the rights of the two minor children of her husband by a former wife: there was no actual ouster, because all the acts and conduct of the widow was entirely consistent with her rights to this property and the rights of the other co-tenants. What did she do which amounted to an actual ouster as to these defendants in error, her co-tenants? All that is shown is that she went into possession and used this land for the support of herself and children; this she had the right to do; this does not constitute an actual ouster of her co-tenants: if so, then the possession of one co-tenant is not the possession of all. There was no demand by the plaintiffs in the bill, who were the children of the deceased husband by a former wife, until a short while before the commencement of this suit, and when such demand was made, they were refused to be let into possession with the widow. This was the first and only notice which they ever had that the widow claimed the exclusive possession of this land, and this was but a few weeks before the commencement of this suit. §2303 of the Code provides as follows: "There can be no adverse possession against a co-tenant until actual ouster, or exclusive possession after demand, or express notice of adverse possession." I think I have shown that both plaintiffs and defendants were tenants in common; that they held this land by one and the same right; that the widow and her children who went into possession of this land did no act which amounted to an actual ouster until the demand was made upon them; that there was no exclusive possession by them until this demand was made; that there was no express notice of adverse possession on the part of the widow until the demand was made by the plaintiffs, and that this demand being made only a few weeks before the bringing of this suit, the plaintiffs are not barred of

Rakestraw, executrix, us. Rakestraw et al.

their rights by the statute of limitations. This being my opinion, I think the decree rendered by the court below should be affirmed.

# RAKESTRAW, executrix, vs. RAKESTRAW et al.

A will appointed the wife of testator as his executrix, and contained the following item: "I will that all the rest of my real estate property, including the house and lot I now occupy and a house and lot I own in Lawrenceville, together with my lands, be held and controlled by my wife during her lifetime. I would also include whatever money and notes I may own. In short, it is my will that my wife shall have full and entire control of all my effects, of whatever kind." The testator having died, the will was probated and the executrix qualified. She filed a bill, alleging that the rents, issues and profits of the estate were not sufficient for the support of herself and the six minor children of the testator, and prayed that she be allowed to sell the same or a portion thereof for such support.

Held, 1. That the will does not confer on the executrix the power of sale.

- 2. That the will creates a life estate in the widow, with remainder to the children of the testator; and it is competent for the life tenant to waive the life estate in the property devised; this would well the whole estate in the children; and it would be in the power of a court of equity to decree a sale of the whole or a part of the property for the support, education and maintenance of the children and the support of the widow. The court could hear evidence at the probable value of the life estate, and decree to the widow such sum as would be equal thereto, and could, by proper order, protect the remainder for the use of the children, or decree that the sum be turned over to the guardians of the minors and to the children who have become of age.
- (a.) An amendment should be made specifically setting forth the property constituting the estate held by the widow, and stating her willingness to surrender her life estate.
- (b.) It seems to be the policy of the law to provide for the support of the widow and minor children, and the courts should in all proper ways forward and carry out this policy.

September 18, 1888.

Wills. Estates. Equity. Remainders. Laws. Be-

#### Bakestraw, executrix, vs. Rakestraw et al.

fore Judge Hutchins. Gwinnett Superior Court. March Term, 1883.

Reported in the decision.

S. J. Winn, for plaintiff in error.

No appearance for defendants.

BLANDFORD, Justice.

Gainum T. Rakestraw made his last will and testament and appointed his wife executrix thereof, and by the sixth item or clause of said will he provided as follows:

"I will that all the rest of my real estate property, including the house and lot I now occupy, and a house and lot I own in Lawrence-ville, together with my lands, be held and controlled by my wife during her lifetime. I would also include whatever notes and money I may own. In short, it is my will that mv wife shall have full and entire control of all my effects, of whatever kind."

The testator having died, the will was duly proved, and Mrs. Rakestraw, the widow, qualified as executrix. She presented her bill to the superior court of Gwinnett county, in which she represented that said Gainum left at his death six minor children; that the rents, issues and profits of the estate of said testator were not sufficient for the support and maintenance of herself and children, and prayed that she be allowed to sell the same, or a portion thereof, for such support of herself and family. The court below, after consideration of said bill, decided that the will of testator does not confer power of sale on the executrix, and the prayer of the bill was refused. This ruling the plaintiff excepted to, and assigned the same as error.

The will of testator creates a life estate in Mrs. Rakestraw, the widow and executrix, the remainder to the children of testator. It is competent for the life tenant to waive her life estate in the property devised, which would Rakestraw, executrix, es. Rakestraw et al.

vest the whole estate in the children of testator; and it would be in the power of the court to decree a sale of the whole or a part of the property for the support, education and maintenance of the children and the support of the widow. The court could hear evidence as to the probable value of the life estate of the widow, and decree to her such sum as would be equal to the value of the life estate, and could, by proper order, protect the remainder for the use of the children, or decree that the same be turned over to the guardians of the minors and to those children who have arrived at age. Section 1824 of the Code provides that, "The ordinary may, in his discretion, allow the corpus of the estate, in whole or in part, to be used for the education and maintenance of the ward." If the ordinary could authorize a sale of this property for their education and maintenance, so can the superior court in this proceeding. if the bill shall be amended so as to allege the willingness of the life tenant to surrender her life estate; then there can be no difficulty as to a sale of the property so surrendered; but the bill should set forth the property specifically constituting the estate held by the widow, and then, with these amendments, the court could decree a sale of this property. taking care to properly secure the minors in the money arising from such sale. The court was right in holding that the executrix had no power of sale of this property conferred on her by this will, but erred in refusing the prayer of the bill for this reason, as it was the power of the court which was invoked by the bill, and the court should have heard the prayer and, on proper terms, granted suitable relief. Our law provides, as necessary expenses of administration and to be preferred before all other debts, a provision for the support of the family, whether the person whose estate is being administered die testate or intestate, solvent or insolvent. Code, \$2571. So it seems that it is the policy of our law to provide for the support of the widow and minor children, the family of a deceased

#### Veal et al. vs. Robinson.

person, and the courts should, in all proper ways, forward and carry out this policy.

Judgment reversed.

Judgment: It is ordered that the judgment of the court below be reversed, upon the ground that the court refused to entertain the bill of plaintiff because no power of sale was conferred on the executrix by the will of testator. And it is further ordered that the court below allow the bill of plaintiff to be amended as herein indicated; and that the court decree a sale of so much of the property as the widow may relinquish her life interest in and to, and that it direct the executrix as to the application of the fund for the support of the family, and the education and maintenance of the minor children.

## VEAL et al. vs. ROBINSON.

- The judge who fried the case committed no errors in the various rulings and charges to which exception has been taken by the defendant below; nor was there error in the finding of the jury upon the questions thus submitted.
- 2. The court should not have refused to submit to the jury the issue made by the defendant's claim to a prescriptive title, and should have charged, as requested, that "color of title is anything in writing purporting to convey title to the land, which defines the extent of the claim, it being immaterial how defective or imperfect the writing may be, so that it is a sign, semblance or color of title; and if they should be satisfied from the evidence that the defendant was in actual, public, continuous, peaceable, notorious and uninterrupted possession of the premises for seven years prior to the commencement of the suit under such color of title, and that her claim did not originate in fraud, and that she held in her own right, in good faith, against all other persons, including her husband; then she was entitled to retain possession of the land." There was some evidence on which this charge could be based, and it should have been given, together with proper instructions, applying hypothetically to the assumed facts, and the jury should have been further instructed as to what constituted fraud and bad faith, and should have been told that if these things existed, defendant had no right to hold the premises.

September 18, 1883.

Veal et al. vs Robinson.

New Trial. Title. Prescription. Fraud. Charge of Court. Before Judge Hutchins. Gwinnett Superior Court. March Adjourned Term, 1883.

Veal and Scruggs brought complaint for land against J. E. Robinson and his wife, Mrs. Fannie Robinson. The abstract of title attached to the declaration was as follows: A deed from Thomas M. Meriwether, chairman of the board of trustees, etc., to Joseph Robinson, dated January 28, 1874; a deed from Joseph Robinson and his wife. Frances E. Robinson, to plaintiffs, dated December 21, 1874; and a deed from J. M. Patterson, sheriff, to plaintiffs, dated December 5, 1876.

J. E. Robinson filed a disclaimer of title. Mrs. Robinson pleaded the general issue.

On the trial, the following facts were shown: De-Witt C. Jones sold the property to Hopkins and others as trustees of the Orphans' Home of the North Georgia Conference, on November 14, 1872; on January 28, 1874, Meriwether, as chairman of the board of trustees, conveyed the land to Joseph Robinson; Joseph Robinson made a deed to Mrs. Fannie Robinson, dated March 12, 1874, the expressed consideration being \$1,500.00; the same grantor, his wife joining him, made a deed to plaintiffs, dated December 21, 1874, for the expressed consideration of \$1,800.00; on December 5, 1876, Patterson sheriff, sold the land under an execution in favor of Burgagainst Joseph Robinson, under a judgment obtained in 1867. Veal and Scruggs were the purchasers.

In addition, plaintiffs introduced evidence to the following effect: Meriwether, as chairman of the board of trustees, sold the land to J. E. Robinson; the latter paid \$350.00 and gave notes for \$1,400.00, receiving a bond for title. Subsequently, by consent of J. E. Robinson, in father, Joseph Robinson, paid the balance of the purchase money and took a deed in his own name; the payment was made by delivering to Meriwether certain notes given

#### Veal et al. vs. Robinson.

by one White to Joseph Robinson. Before the purchase, J. E. Robinson said it was all right; that there was nothing in the way, but that it was bought with the proceeds of his father's homestead. He showed them over the In August, 1875, Scruggs, one of plaintiffs, went to the place. J. E. Robinson and his wife, the defendant, were living on it. Mrs. Robinson said they had it rented from Joseph Robinson (her husband's father), and wanted to rent it again if plaintiffs bought; that she would send her husband down to see about it. He did go to Stone Mountain, together with his father, in December, 1875, to see plaintiffs, and rented the place, giving his note for the rent; this has been sued on but not collected, and has been held by plaintiffs. Prior to this, Veal, one of plaintiffs, testified that he bought of Joseph Robinson a note of J. E. Robinson for \$100.00 for rent of the place for 1874: J. E. Robinson said it was all right, that it would be paid; it was not, however, and Veal left it with one Miller, a justice of the peace, for collection, and has not seen it since. When the sheriff levied on the place, he served notice of the levy on J. E. Robinson; his wife was present at the time; it was spoken of at the supper table, in presence of Mrs. R., what the sheriff had come for. Subsequently plaintiffs sued J. E. Robinson for the land, a recovery was had, writ of possession issued in 1880, and plaintiffs were put in possession. Defendant was present; before dispossession, she told one of the plaintiffs that she wished to buy the land if she could get some money that was coming to her. When the sheriff sought to dispossess her, she refused to go out; wanted a few days to see her attorney; but did not claim or exhibit any title. Plaintiffs were put in possession and left a tenant there; the tenant remained two or three days, and was then put out by Wimpy, the attorney of defendant; and when one of plaintiffs went to the place, he found Wimpy and defendant and family there. J. E. Robinson returned the land for tax as his up to 1877, and then his wife returned it.

Veal et al. vs Robinson.

Defendant also presented evidence, in brief, as follows: J. E. Robinson bought the land from Meriwether, chairman of the board of trustees, for his wife, gave notes signed by him for her, and took a bond for titles for her. He paid off the first note of \$350.00 with her money. The balance of \$1,400.00 was paid in the following manner: Joseph Robinson, the father of J. E. Robinson, discovered that Mrs. Robinson, the defendant, had some money, and went to his son several times to get it; he had notes on one White, and it was arranged that Meriwether would take the notes for the last payment; this was done, and J. E. Robinson let his father have his wife's money for the White notes, contrary to his wife's wishes and instructions, she having given him the money to pay the balance of purchase price and take the deed to her. was made to Joseph Robinson because he "wanted it that way, and he would make a deed to defendant in a short time." J. E. Robinson did not know there was anything against his father. On being informed what had been done, defendant was surprised and dissatisfied. Joseph Robinson came up on March 14, 1874, and made the deed to defendant.

J. E. Robinson denied having given any rent note to Joseph Robinson; admitted that he gave the note to plaintiffs in 1875; he explained this by saying that he and his wife became dissatisfied and wanted to move off the place, and told Joseph Robinson to sell it; that Scruggs, one of the plaintiffs, came up and told him that plaintiffs had bought the land from Robinson, and he thereupon gave them a rent note; that when he went down to close the matter with Joseph Robinson, he found that "it was not satisfactory, and no sale as he instructed; then he repudiated said note and made old man Joseph Robinson, afterwards in November, 1876, take up this note by his note, and delivered it same day to Veal, and Veal gave an order on J. A. Miller for the note." (This we denied by plaintiffs.) He never told his wife anythms

# Veal et al. vs. Robinson

about the note, and she knew nothing of it until about the note, and she knew 100 from the estate was sued. He received \$375.00 in 1873, and these about the sued. He received \$315.08 and these sur was sued. He received in 1873, and these sur father in 1872, and \$88.00 in They were marriage for the land. father in 1879, and \$88.00 in They were married towards paying for the land.

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of the court.

#### Veal et al. ve. Robinson.

- (4.) Because the court did not charge certain requests in substance as follows:
- (a.) That Mrs. Robinson is not bound by the acts of her husband, unless he was her agent or his acts were ratified by her.
- (b.) That if Mrs. Robinson had possession adverse to her husband and everybody else, it would charge plaintiffs with notice.
- (c.) It was not the duty of Mrs. Robinson to record the deed received by her from Joseph Robinson immediately; nor to notify plaintiffs that he had no title; but it was their duty to take notice.
- (d.) Innocent purchasers are protected because they invest their money on the faith of the apparent rights of the seller as the parties have allowed them to exist; a judgment creditor does not stand in the same position; one arises by contract; the other by operation of law. A judgment lien is on defendant's property, and is good as a general rule on property to which defendant has a clear equitable title, but does not extend to property where the equitable title is in a third person, though the legal title may be in the defendant.
- (5.) Because the court refused to submit the issue on the title by prescription in his charge to the jury (a plea of prescription having been filed by the defendant) and refused to charge as follows: "Color of title is anything in writing to land which defines the extent of the claim. It is wholly immaterial how defective or imperfect the writing may be; if it is in writing, it is sign, semblance or color of title. If, therefore, you are satisfied from the evidence, that Mrs. Fannie Robinson was in the actual, public, continuous, notorious, exclusive, uninterrupted, peaceable possession of the premises in dispute, seven years prior to the commencement of this suit, under color of title such as I have described to you, which must not originate in fraud, and possessed the land in her own right against her husband and all other persons, then you will find for the defendant."

#### Venl d oi, re. Robinson.

[To this ground the court appended the following note: "The court refused to charge on the subject of prescription because it did not consider the notes taken up by defendant a color of title."]

(6), (7.) Because the court admitted evidence of sayings-conversations and transactions of Robinson, not in his wife's presence.

[The court appended the following note: "In reference to the seventh, eighth and ninth grounds, the court admitted the sayings of Robinson because there was some evidence that he and his wife entered in possession of the land in dispute under a contract of rent made by J. E. Robinson, and as he was the head of the family, prima facie he was in possession, and the wife's possession was his. The court in admitting this evidence stated that, as the case stood at present, the evidence was admissible. Whether it would amount to anything, would depend on the case that the defendant might make when she came to introduce testimony,—meaning that if she should show written title to herself, the prima facie presumption that the possession was that of the husband would be rebutted."]

(8.) Because the court admitted the evidence of J. W. Scruggs, as follows: Witness had a suit against Joseph E. Robinson for the possession of the land in dispute and gained it in the Supreme Court. During the time of said suit Fannie Robinson never asserted her right or claim to the land, and witness never heard of her claim until after he had gained the suit.

[See note to (6) and (7).]

- (9.) Similar to (6) and (7).
- (10.) Because one of the jurors was a nephew by marriage of a brother of one of plaintiffs. [Affidavits were referred to but none were attached.]
- (11.) Because the court admitted in evidence the note given by J. E. Robinson to Veal and Scruggs for rent of the property in dispute.

#### Veal et et. w. Robinson.

- (12.) Because the court admitted in evidence the writ of possession issued at the suit of plaintiffs against J. E. Robinson, with the entry of the sheriff thereon showing that he had placed plaintiffs in possession.
- (13.) Because, pending the progress of the case, one of the jurors had a conversation with an outsider in regard to it. [There was a showing and counter showing as to this ground which were very conflicting.]
  - (14) to (17.) General exceptions to the verdict.

By amendment was added another ground as to sickness of counsel for defendant during the trial; but it appeared that he went through the trial and did not ask for a continuance.

The motion was sustained, and plaintiffs excepted.

CLARK & PACE; S. J. WINN, for plaintiffs in error.

J. A. Wimpy, for defendant.

# HALL, Justice.

- 1. A careful examination of this voluminous record satisfies us that the judge who tried this case committed no error in the various rulings and charges to which exceptions have been taken by the defendant below, nor was there error in the finding of the jury upon any of the questions thus submitted to them. To this extent the verdict was in accordance with the evidence. There was no error in refusing to charge any of the requests made by defendant's counsel, except in one instance.
- 2. The court should not have refused to submit to the jury the issue made upon the defendant's claim to a prescriptive title, and should have charged upon that subject as requested by her counsel, "that color of title is anything in writing purporting to convey title to land, which defines the extent of the claim, it being immaterial how defective or imperfect the writing may be, so that it is a sign, semblance, or color of title; and if they should be

## Hayden et al. vs. City of Atlanta et al.

satisfied, from the evidence, that the defendant was in the actual, public, continuous, peaceable, notorious, and uninterrupted possession of the premises for seven years prior to the commencement of the suit, under such color of title, and that her claim did not originate in fraud, and that she held in her own right in good faith against all other person, including her husband, then she was entitled to retain possession of the land." This charge ought to have been given, together with proper instructions applying hypothetically to the assumed facts; and the jury should have been further instructed as to what constituted fraud and bad faith, and should have been told that if these things existed, then she had no right to hold the premises. There was some evidence on which this charge could be requested, and the issue that it made should have been submitted to the consideration of the jury, and they should have been left to apply it to the facts of the case. Whether it would have changed their finding we cannot certainly know, and we forbear the expression of any opinion as to the effect it should have in bringing about a different result upon another trial. For the reason above stated, and for that alone, the judgment granting a new trial is affirmed.

Judgment affirmed.

# HAYDEN et al. vs. CITY OF ATLANTA et al.

- 1. An act of the legislature conferring on a municipal corporation the power to grade, pave and improve its streets and sidewalks, and to assess the real estate abutting on each side of the street improved, in proportion to its frontage, for the payment of one-third of the cost of such improvements, is not in violation of the constitutional requirement that taxes shall be ad valorem and uniform. Such assessments are not taxes within the meaning of the constitution.
- Neither are such assessments an exercise of the right of eminent domain; and an act of the legislature authorizing them is not in conflict with the constitutional provision that private property shall not be taken or damaged for public use except upon just compensation first made.

January 15, 1884.

Hayden & al. vs. City of Atlanta & al.

Municipal Corporations. Streets. Pavements. Constitutional Law. Taxes. Assessments. Before Judge Hammond. Fulton Superior Court. October Term, 1883.

In 1881, the charter of the city of Atlanta was amended by an act of the legislature which provided that the mayor and general council might grade, pave, macadamize, and otherwise improve for travel and drainage the streets, lanes and allevs of the city, and construct sidewalks and pave and curb the same, and put down cross-drains and crossings. The act authorized the mayor and council to assess one-third of the cost of these improvements on the real estate abutting on each side of the street improved. the assessment being made in proportion to frontage. It was provided that before such improvements should be made, there should be a written request therefor to the commissioners of streets and sewers from persons owning real estate having at least one-third of the frontage on the street or part of street to be improved. In case of non-payment, executions were to be issued, and be levied by the marshal. It was also provided that affidavits of illegality might be filed thereto as in other cases. material sections of the act are stated in the decision.

Under this act, the city council passed ordinances providing for the paving of certain streets. A number of property owners on Marietta street refused to pay the assessments demanded of them for the cost of grading and improving that street, with its crossings, sidewalks, etc. Executions were issued against them. They tendered affidavits of illegality to the marshal who refused them, and they thereupon filed their bill to enjoin the executions from proceeding. The principal grounds of illegality alleged were as follows:

- (1.) That the act of the legislature allowing these assessments was unconstitutional, because it provided for a tax which was not ad valorem and uniform.
  - (2.) Because the provision that a street should not be

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improved except up a the written request to the commissioners of streets and sewers of persons owning real estate having at least one-third of the frontage on the street or portion of street to be improved, was a delegation of logislative authority.

- (3), (4). That the debt of the city of Atlanta exceeded seven per centum of the taxable property therein, and that the contract for paving amounted to incurring an indebtedness, which could not be done, under the constitution.
- (5). That the issuing of executions for such assessments and the sale of property thereunder amounted to taking private property for public use without due process of law and without compensation therefor being first made.
- (6). That the assessment or tax is not uniform on the same class of subjects.

Defendants answered the bill, taking issue with the complainants on the propositions stated above, and denying that the city was incurring any debt in making contracts for the paving of the streets, inasmuch as it first provided the means of payment for such works.

The chancellor refused the injunction, and complain ants excepted.

Broyles & Johnston; Frank A. Arnold; Manata Howell, for plaintiffs in error, cited Const., Art. 7: 67 & a., 299; 34 Ill., 203; 9 Heisk., 349; 24 Am. R., 308; 40 Ill., 211; 94 Ill., 604; 12 Rich., 702; 45 Ala., 310; 32 Ark., 31; 41 Ga., 21; 47 Id., 562; 8 Neb., 124; 4 Coms., 419; 5 Ohio, 243; 2 Oregon, 152-3, 165-7; 28 Cal., 162-3; 25 Miss., 458-462; 4 R. I., 230, 240; 2 Kansas, 485; 12 Allen, 223, 500; 9 Vroom, 190; 96 U. S. R., 97; 74 N. Y., 183; 30 Am. R., 289; 35 Mich., 194; 24 Am. R., 541; 38 N. J., 190; 65 Penn., 146; 2 Dill. Mun. Corp., \$800, 968-9; Cooley Const. Lim., \$156, note; 7 Nev., 68; 7 Kansas, 592; 65 Pa., 146; 2 Dill., 746 et seq.; 67 da., 298; 64 Id., 286; 1 Dill., 136; 84 Ill., 282; 89 Id., 282; 87 Id., 385; Cooley on Taxation, 456, 147-8, note; Code of At-

## Hayden et al. vs. City of Atlanta et al.

lanta, §§62, 647-8; Code of Ga., §1670; 63 Ga., 194; 8 Id., 23; 60 Id., 404; 1 Dill. Mun. Corp., §21; 2 Id., 763; 10 Bush., 182; 20 Minn., 511; 19 Wall., 660.

W. T. NEWMAN; E. A. ANGIER, for defendants, cited 11 Ga., 294; 28 Id., 613; 61 Id., 200; 19 Viner's Abr., p. 410; 7 Comyn's Dig., t. p. 338; 12 Rich. (S. C.), 733; 3 Bac. Abr., (G.) p. 59, sec. 45; 4 Comst. (N. Y.), 438 and cases cited; 4 Jones Eq., (N. C.), cited in 1 Dill. Mun. Corp., (3d Ed.), p. 17, note (2); Cooley on Taxation, 1; 42 Ga., 598; Acts 1880-1, p. 358; Code of Atlanta, 1883, §162 et seq.; 57 Ala., 6; 12 Cal., 76; 28 Id., 345; 29 Id., 75; 123; 31 *Id.*, 240; 40 *Id.*, 497; 51 *Id.*, 15; 12 Ill., 406; 26 Id., 357; 94 Id., 604; 26 Ind., 119; 27 Id., 223; 29 Id., 329; 14 Id., 199; 31 Iowa, 31; 2 Kansas, 485; 11 Bush., 527; 7 Id., 667; 4 La. An., 7, 4; 5 Id., 112, 362-3. 504; 7 Id., 72, 77; 10 Id., 57; 11 Id., 220, 338, 387; 20 Id., 497; 70 Me., 516, 522; 48 Md., 265; 12 Allen, 500, 23; 2 Mich., 560; 8 Id., 274; 18 Id., 495; 47 Miss., 713, 367; 25 Id., 458; 27 Id., 209; 38 Id., 652; 25 Mo., 593; 30 Id., 437; 31 Id., 345; 44 Id., 458; 49 Id., 552; 50 Id., 529; 53 Id., 44; 4 Neb., 336; 8 Id., 124; 18 N. J., Eq., 519; 41 N. J. L., 83; 3 Wend., 263; 11 Johns., 77; 15 Wend., 376; 24 Id., 65; 67 N. Y., 533; 84 Id., 108; 4 Coms., 419; 1 Ohio St. (N. S.), 126; 5 Ohio, 243, 250, 520; 8 Id., 333; 9 Id., 540; 10 Id., 160; 36 Id., 164; 2 Oregon, 146; 3 Watts, 292; 7 Harris, 258; 9 Id., 147; 13 Pa. St., 107; 25 Id., 128; 61 Id., 255; 69 Id., 352; 73 Id., 404; 83 Id., 156; 4 R. I., 240; 1 Swan, 177; 6 Humph., 371; 51 Tex., 302; 42 Id., 626; 45 Id., 271; 44 Vt., 174; 26 Grat., 224; 31 Id., 571; 14 Wall., 676; Cooley on Taxation, 416, 473; Burroughs on Taxation, §§145-51; Cooley Const. Lim., 619-39; Dill. Mun. Corp., \$\$735-832; Hilliard on Taxation, p. 364, 27; Code, §4683, 786; 60 Ga. 100; 64 Id., 133; 67 Id., 386; 11 Johns., 77; 7 Md., 517; 31 Pa., 69; 26 Mo., 468; 38 Miss., 675; 67 Ga., 106; 35 U. S., 37; 96 Id., 97, 107; 18 How., 272; Dill. Mun. Corp. (8d Ed.) §754; 104 U. S., 78; 5 Ga., 194; 4 Coms., 419;

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44 Vt., 175; 31 Iowa, 31; 94 Ill., 604; 49 Mo., 552; 50 Id., 525; Dill. Mun. Corp. (3d Ed.), §752; 30 Mich., 24; 38 Pa. St., 503; Cooley Const. Lim., 637; 19 Viner's Abr., t. p. 338; 23 Ga., 402; Code of Atlanta, 1883, §§163-5; Cooley on Taxation, p. 398; 2 Dill. Mun. Corp. (3d Ed.), §798; 6 Humph. (Tenn.), 368; 1 Swan, 177; 31 Grat. (Va.), 576 and authorities cited; 16 Pick., 514, 509; 25 Mo., 596; Dillon Mun. Corp., § 761, par. 6; 5 Ohio, 244; 4 R. I., 240; 54 Ga., 663; 9 Ga., 253; 44 Id., 649; 68 Id., 686; 16 Id., 102; 39 N. H., 304; 11 La. Ann., 338; 42 Ga., 596; 68 Id., 686; Code, §5081; Cooley's Const. Lim., 631-2; 12 Cal., 84; Cooley on Taxation, p. 451; Cooley Const. Lim., 507; Dill. Mun. Corp. (3d Ed.), §752; 94 Ill., 604; 44 Vt., 174; 7 Exch., 768-77; 18 Mich., 495; 10 Ohio, 156; 18 Mich., 496; 45 How. Pr. (N. Y.), 289; 34 Ind., 36; 86 N. C., 8, 552.

# BLANDFORD, Justice

The question in this case is as to the constitutionality of an act to amend the charter of the city of Atlanta approved September 3, 1881.

The first section of the act authorizes the mayor and general council of the city of Atlanta "to grade, pave, macadamize and otherwise improve, for travel and drainage, the streets and public lanes and alleys of said city, and to construct sidewalks and pave the same, put down curbing, cross-drains, crossings, and otherwise improve the same."

Section 2d provides "That in order to fully carry into effect the authority above delegated, the mayor and general council shall have full power and authority to assess the cost of paving and otherwise improving the sidewalks, including all necessary curbing for the same, on the real estate abutting on the street, and on the side of the street on which the sidewalk is so improved."

Section third authorizes the mayor and general council "to assess one-third of the cost of grading, paving, macad-

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amizing, constructing side-drains, cross-drains, crossings, and otherwise improving the roadway or street proper, on the real estate abutting on each side of the street improved, provided that before any street or portion of a street shall be so improved, the persons owning real estate which has at least one-third of the fronting on the street or portion of the street, the improvements of which is desired, shall in writing request the commissioners of streets and sewers to make such improvements," etc.

Section fourth, among other things, provides that assessments for the costs of such improvements shall be prorated on the real estate according to its frontage on the street so improved.

Section fifth provides that the assessment on each piece of real estate shall be a lien on the same from the date of the ordinance providing for the work and making the assessment.

Section sixth provides for the collection of the assessment by execution and sale of the property assessed. the defendant having the right to contest the same by illegality, which is to be returned to and tried by the superior court of Fulton county.

The plaintiffs in error insist that the foregoing act violates paragraph 1, section 2, article 7 of the constitution of this state, in which it is provided that "All taxation shall be uniform upon the same class of subjects, and advalorem on all property subject to be taxed within the territorial limits of the authority levying the tax \* \* \* \* (Code, §5181), and is therefore null and void.

Again plaintiffs insist that, if the assessments provided for in the act of September 3, 1881, are not by virtue of the taxing power, it is the taking of private property for public use without just compensation, and the act is void on this account.

Taxes are different from assessments for local improvements, taxes being burdens upon all persons and property alike, and compensated for by equal protection to all.

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while assessments are not burdens but equivalents, and are laid for local purposes upon local objects, and are compensated for to some extent in local benefits and improvements, enhancing the value of the property assessed. Taxes are imposed on the person, assessments are imposed on the property. This is the rule as recognized in most of the states of this Union, as will be seen by the following cases: 4 Comstock, (N. Y.), 438; 12 Cal., 76; 28 Id., 345; 12 Ill., 406; 26 Ill., 357; 94 Ill., 604; 26 Ind., 119; 27 Id., 223; 29 Id., 329; 14 Id., 199; 2 Kansas, 485; 7 Bush, 667; 10 La Ann., 57; 11 Id., 220, 338, 387; 20 Id., 497; 70 Maine, 516; 48 Md., 265; 2 Mich., 560; 8 Id., 274; 18 Id., 495; 12 Allen, 500; 47 Miss., 713, 367; 25 Miss., 458; 25 Mo., 593; 31 Id., 345; 50 Id., 529; 58 Id., 44; 4 Neb., 336; 8 Id., 124; 18 N. J. Eq., 519; 41 N. J. L., 83; 67 N. Y., 533; 84 Id., 108; 11 Johns., 77; 15 Wend., 376; 1 Ohio St., 126; 5 Ohio, 243; 8 Id., 333; 36 Id., 164; 2 Oregon, 146; 13 Penn. St., 107; 69 Id., 255; 4 R. I., 240; 6 Humph., 371; 51 Tex., 302; 26 Grat., 224; 86 North Carolina, 8, 552.

Hence it follows that the power conferred by the legislature on the city of Atlanta by the act of 1881, to assess the property abutting on streets to be improved, for such improvements, is not the exercise of the taxing power by that city so as to require the same to be uniform and ad valorem, as required by the constitution of this state.

The assessments authorized by the act in question is not the taking of private property for public use without just compensation. Every person in this state owes a duty to the public to work the public roads and highways, and it is in the power of the legislature, representing the public, to compel a performance of this duty, and it may confer upon municipal corporations this power; it is also competent to authorize these corporations to have the work done on the public streets and thoroughfares of the various municipalities of this state in such manner, by pavements, crossings, drains, and curbings, as may be

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necessary, and to compel the owners of real estate fronting thereon to pay the costs and expenses of such improvements. There is nothing in the constitution of this state or of the United States to prevent this being done. can see no reason why the legislature may not force every person to work on the public roads and highways, and perform such service in proportion to the land that such person may own lying on such roads. If this power exists under the constitution of this state, why cannot the state make the improvements itself, and assess the landowners to pay for the same? This is but the exaction of a duty the person owes the public; and in the case before us the power conferred by the legislature on the city of Atlanta, and the exercise of that power by the city to make these improvements and to assess and collect the cost of the same from the property owner, is the exercise of governmental powers by a municipality which is a part of the state government; it is, under the circumstances, the same as if done by the state itself. Again, it is a part of the police power of the state conferred on this city. have sewers is to provide for the health of the people of the city; to have well paved streets and sidewalks is to afford reasonable accommodation to the public; also, the means for fire engines to reach the scene of conflagration; all these things are for the public benefit. The blessings conferred by these improvements are shared by the owners of the property assessed in a greater degree than the general public, but whether this was so or not, the power resides in the state, and the legislature may by law confer upon municipal corporations the right to make these improvements and to assess the property fronting on the streets thus improved for the cost of the same.

The taxing power is limited or circumscribed in this, that taxes must be uniform and ad valorem as prescribed in the constitution.

The exercise of the right of eminent domain is also limited, in that private property can only be taken for public use upon just compensation being made.

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But the power to have worked, opened, repaired and improved the public highways, streets and roads, may be exercised by the legislature in such manner and way, and under such circumstances as may be deemed best. There is no limitation imposed by the constitution upon this power; it rests upon the sound discretion of the legislature. Salus populi suprema lex.

The act of 1881 is constitutional and valid, and the chancellor did right to refuse the injunction prayed for by each and all of the plaintiffs in error.

Judgment affirmed.

### RICHARDSON vs. THE STATE OF GEORGIA.

- 1. In a criminal case the judge should instruct the jury that the evidence, to authorize a conviction, should be of such conclusive character and tendency as to exclude reasonable doubt; and a failure so to charge will cause a new trial, although the attention of the court may not have been called to the omission.
- (a.) Previous cases considered and reviewed, 7 Ga., 3, 13; 19 Id., 1, 2, 6. 7; 28 Id., 200, 216; 35 Id., 241, 242; 41 Id., 485, 505.
- (b.) In this case the omission was calculated to injure defendant.
- 2. It was error in this case to charge that "if the defendant came upon the prosecutor and his wife in the act of adultery suddenly, with his passions aroused, and being so enraged at seeing the acts of the parties, kills the party then and there, it would not be murder, but manslaughter," and that "the jurors are the judges of all these circumstances." Such charge was not based on the evidence in the case.
- (a.) Such charge was not good law. The case put in this charge, under §4334 of the Code would have justified the killing of the adulterer taken in the act. A husband has as much right to protect his wife from this as from other wrongs; and, if necessary to prevent its perpetration, he may take life, and it will not be murder.
- (b.) The case made here might or might not have amounted to voluntary manslaughter, according to the circumstances. At all events, they should have been submitted to the jury, whose province it was to say whether they stood upon the same footing of reason and justice as all other instances enumerated in the Code as justifying a homicide, or whether the shooting was the result of that sudden and violent impulse of passion, supposed to be irresistible, excited either by an actual assault, or an attempt

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to commit a serious personal injury upon the defendant by the prosecutor, or other equivalent circumstances to justify the excitement of passion and to exclude all idea of deliberation or malice; whether the shooting was under the influence of passion, or in a spirit of revenge.

(c.) Opinion of Jackson, Chief Justice, in 66 Ga., 90, considered and approved.

September 25, 1883.

Criminal Law. Charge of Court. Murder. Adultery. Before Judge Bower. Dougherty Superior Court. April Term, 1883.

Reported in the decision.

- L. Arnheim, for plaintiff in error.
- J. W. Walters, solicitor general, for the state.

HALL, Justice.

The first question made by this record is whether, in a criminal trial, the judge, in his charge to the jury, should instruct them that the evidence, to authorize a conviction, should be of so conclusive a character and tendency as to exclude reasonable doubt; and failing so to charge, whether the omission is such error as to require the verdict to be set aside and a new trial granted, when his attention was not called to it and no request was made by the defendant or his counsel to supply it. Under the several rulings of this court, the point here made is not free from difficulty. In Studstill's case, 7 Ga., 3, 13, it is intimated rather than decided that, where the court charges the jury correctly upon a point of law, it is no error that the judge did not specify more minutely the shades of difference. where no request is made by counsel for this purpose. At the same time and in this immediate connection, it was held that the presiding judge had the right, and it was his duty to declare, what the law was upon a given state of In Bowie's case, 19 Ga., 1, 2, 6 and 7, it is said that

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"the mere omission by the court to charge a jury on a point, is not, in general, a ground on which a new trial may be demanded. The point ought, at least, to be such that the law on it is somewhat doubtful or abstruse. If it be not such a point, why should we say that the jury, a body which indisputably in criminal cases is made the judges of what the law is, did not follow the law" (citing Graham on New Trials, 122); "and the rule that, in considering a person's admission, all of the admissions are to be taken together, is one so obvious that a jury would, of themselves, it is to be presumed, follow it."

In Brown's case, 28 Ga., 200, 216, where the judge failed in his charge to point out some nice shades of difference in grading the homicide, it was held that "if the court fail or omit to charge the jury in regard to any particular point claimed by counsel to be involved in the cause, and the counsel make no request of the court in writing to charge the jury on such point, they must be held to have been satisfied with the charge as given."

In Farris's case, 35 Ga., 241, 242, where the judge omitted to charge a clause of the Code which could not benefit the defendant, it was held to be no ground of complaint, and if deemed material, counsel should have suggested such additional charge as was desired.

All of these decisions were made prior to the ruling by this court that the jury in criminal cases should take the law from the court. Afterwards, the case of *Hill*, 41 *Ga*. 485, 505, came up, in which it was held that "where the omission to give a charge by the court was supplied by the judge giving a more favorable one than the law of the case required, there was no error."

Lochrane, C. J., who delivered the opinion in that case, remarked: "We have not held that the judge below must charge, in all cases, upon the various grades of homicide, but have qualified this general rule by this principle, that in cases where the facts justify or require such a charge, it shall be given. With or without request, it is the

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duty of the court to present to the jury all the law applicable to the case, and if facts, however slender, support theories of the defence, involving any or all the grades of homicide, they must be given in charge. Errors of omission are as fatal as errors of commission. The judges below are bound to know the law applicable to the case, and must give it in charge to the jury. This is imperative and overwhelming in its conviction and direction of duty."

None of these cases deal directly with the precise ques-One of them (Bowie's case) does so argution here made. mentatively, and would seem to repel the idea that it is incumbent upon the presiding judge to give in charge to the jury, who are made the judges of the law in such cases, the ordinary and obvious principles which lead to the conclusion in such trials, but that this should only be done where the law of the case is "somewhat doubtful or abstruse," while it is clearly ruled in Studstill's, "that it is the duty of the judge to declare what the law is on a given state of facts," with the implied qualification that the charge need not specify minutely fine shades of difference, where no request is made by counsel for the purpose." The cases of Brown and Farris stood upon their own circumstances. In the former the court omitted to specify nice shades of difference in grading the homicide, and in the latter a charge more favorable to the defendant was given than the law authorized upon the point in question. It may be true that what fell from the Chief Justice, in Hill's case, was obiter, but we think the rule announced was the logical conclusion from the state of the law as then held by the court, and that, irrespective of this modification of the old rule as to the source from which the jury must take the law in criminal cases, the principle there announced is sound.

We are satisfied that the omission in this case was the result of inadvertence, and that had the judge's attention been called to it, he would have promptly supplied it.

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But the jury did not know from what cause it resulted; they had perhaps heard it given in all other trials had before them at that term of the court, and may have concluded, from its absence in this instance, that it was not applicable, and that they were not authorized to give the defendant the benefit of any reasonable doubt. Be this, however, as it may, we are satisfied, from the character of the charge upon the point on which this defence turned, and which we shall presently see, laid down a more rigid rule than our law warrants, that this omission was detrimental to this defendant, and that his case has not been fairly submitted to the jury; and so believing, we hold that a new trial should have been ordered upon this ground.

2. There was evidence in the case to show that the prosecutor had committed adultery with defendant's wife; that notwithstanding he had promised to abandon this intercourse, he was nevertheless, on the very day of the shooting, found associating with this woman, and bestowing favors upon her, which would lead to the conclusion that it was his purpose to renew this illicit cohabitation, and that this fact was communicated to the defendant, and that the rencontre ensued upon their first meeting afterwards.

On this ground of defence, the court charged the jury that, "if the defendant came upon the prosecutor and his wife in the act of adultery suddenly, with his passions all aroused, and being so enraged at seeing the acts of the parties, kills the party then and there, that it would not be murder but manslaughter," and that, "the jurors are the judges of all these circumstances." As embodying an abstract proposition, we do not consider this charge correct, under the laws of this state, as will be presently shown. But apart from this, the case put in this charge is entirely outside of the defence insisted on. There was no evidence tending to show that the prosecutor had ever been caught by the defendant in the act of adultery with his wife. So the charge as given rests on no foundation, and is wholly

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inapplicable to the facts proved. In every sense of that term, it is inapposite, and was wide of the mark at which it was aimed, and failed to approach the principle of the defence actually set up.

The case put in this charge would, under section 4334 of our Code, have justified the killing of the adulterer taken in the act. There is not a case in our reports, from that of Biggs in 29 Ga., 723, to that of Stewart in 66 Ib., 90, that lays down a different rule. It must be remembered, too, that everal of these cases occurred before seduction was made a felony by our law (Code, §4371). Surely a husband has as much right to protect his wife from this as from other felonies, and if necessary to prevent its perpetration he may take life, and it will not be murder.

The case made here might or might not have amounted to voluntary manslaughter, according to the circumstances; at all events they should have been submitted to the jury, whose province it was to say whether they stood upon the same footing of reason and justice as all other instances enumerated in the Code as justifying a homicide, or whether the shooting was the result of that sudden and violent impulse of passion supposed to be irresistible, ex. cited either by an actual assault, or an attempt to commia serious personal injury upon the defendant by the prosecutor, or other equivalent circumstances to justify the excitement of passion, and to exclude all idea of delibera. tion and malice. Whether, if the defendant, upon meeting the prosecutor soon after he was informed of the renewed attempt of the latter to continue his adulterous cohabitation with his wife, was so much excited by that fact and the quarrel and rencontre that ensued upon the meeting. that his passion became irresistible and he shot under the influence of that passion, or deliberately in a spirit of revenge: if under the latter, he was guilty of the offence charged; if under the former, then he may have, without other provocation, been guilty of shooting at another not in his own defence or under circumstances of justification,

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according to the principles of the Code; if to the verbal altercation the prosecutor added an assault accompanied with blows, then the defendant, for the excess of violence used in repelling the assault, etc., may have been guilty of assault and battery. That all these several phases of the law should have been submitted to the jury, and that the charge should have covered every theory of the defence warranted by the evidence, see 29 Ga., 724, 728, Biggs vs. The State; 30 Ib., 894, 895, Cook vs. Wood; 43 Ga., 137, Pounds vs. The State; 46 Ga., 159, Elliott vs. The State; 64 Ib., 453, Hill vs. The State; 66 Ib., 90, Stewart vs. The State, especially the concurring opinion of Jackson, Chief Justice, to which he adheres, and in which his associates on this bench concur as containing the correct view of the law applicable to this case.

There is no other exception taken to the rulings and decisions of the lower court which we deem material.

Judgment reversed.

# HARRIS vs. Hull, executor.

[Jackson, Chief Justice, being disqualified, did not preside in this case.]

- 1. In construing conveyances of land, effect is to be given to every part of the description, if practicable; but if the thing intended to be granted appears clearly and satisfactorily from any part of the description, and other circumstances of description are mentioned which are not applicable to that thing, the grant will not be defeated, but those circumstances will be rejected as false or mistaken. What is most material and most certain in a description shall prevail over that which is less material and less certain.
- (a.) Courses and distances and computed contents yield to ascertained boundaries and monuments.
- (b.) In so far as the charge gave preference to the description in certain deeds referred to in a mortgage and deed in settlement thereof over boundaries specified therein, it was error, but it was not error which hurt the plaintiff.
- The other exceptions made by the plaintiff to the rulings of the court in admitting and rejecting testimony are not well taken; the grounds upon which they were made are not sustained by the facts in evidence.

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- 3. A deed given in payment of a debt, although usury may have entered into the consideration, is not thereby rendered void; alter, where the deed is given to secure a debt.
- 4. Such of the plaintiff's requests as were refused were properly so.
- 5. It was error to grant a new trial.

September 18, 1883.

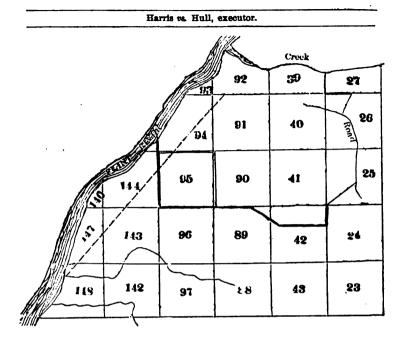
Deeds. Title. Practice in Supreme Court. Charge of Court. Before Judge Bower. Worth Superior Court. April Term, 1883.

Hull brought suit against Harris on a promissory note for \$5,000, with certain credits thereon, made by the defendant to J. S. Linton or bearer, on December 28, 1871. and indorsed by Linton. The defendant pleaded failure of consideration in this, that the note was given for the purchase money of certain lands, including land lot 95 in Worth county, and was transferred after due; that he paid on it \$4,100; that lot No. 95, of the value of \$1,178.50 was, at the time of the sale, under mortgage, of which defendant had no notice; that Linton made a warranty deed to the mortgagee for the land; that the mortgage was also foreclosed, the property sold by the sheriff and bid in by the mortgagee.

The principal question in the case was whether the mortgage and deed under it included lot No. 95 or not. Reference to the following map will explain the positions assumed by counsel:

Plaintiff contended that, according to the description in the mortgages and deed from Linton to Rowley and Craig, the south line ran along the north side of lot No. 89 till it reached No. 95, thence north to the corner of No. 94, thence along the north line of No. 95—thus excluding No. 95. Defendant contended that the south line of the property ran along the north line of Nos. 89 and 96 till it reached No. 144, thence north,—thus including No. 95.—The dark lines show the outline of the property.

The plaintiff introduced the note and closed. Defend-



ant showed in brief, as follows: On November 26, 1868, Linton made to John Craig a mortgage containing the following description of the mortgaged property: "All that tract or parcel of land situated, lying and being in the county of Worth in said state, containing seventeen hundred and sixty (1760) acres, more or less, being lands bought by the said John S. Linton from Jones & Shine, T. M. Monger, J. P. Cox and J. D. Deriso, and bounded on the north by Swift creek, west by Flint river, south by the lands of Deriso and Holliday, and east by the lands of estate of Cox and B. T. Gleaton." On the same day he made to Harmon Rowley a mortgage containing substantially the same description. On February 17, 1871, Linton made to Rowley and Craig a warranty deed in satisfaction of the mortgages. The description in the deed was as follows: "All that tract or parcel of land lying and being in the county of Worth in said state, containing seventeen hundred and twenty acres, more or less, being the lands

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bought by the said party of the first part from Jones & Shine, T. M. Monger, J. P. Cox and J. B. (D.?) Deriso, and bounded on the north by Swift creek, on the west by Flint river. on the south by the lands of Deriso and Holli day, and east by the lands of estate of Cox and B. F. Gleaton; the property hereby conveyed being the same that was mortgaged to the said parties of the second part on the twenty-sixth (26) day of November, eighteen hundred and sixty-eight (1868)."

On December 28, 1871, Linton sold to Harris and gave bond for titles to lots 95, 96, 143, and fractional lots 147 and 148, aggregating 765 acres, more or less, for \$5,000. On February 4, 1873, the sheriff made a deed to Rowley, in pursuance of a sheriff's sale under Rowley's mortgage, describing the land as described in that mortgage.

To explain the description contained in the mortgages and deed from Linton, a deed from Jones, administrator, and Shine, administratrix, to Linton, was introduced, conveving lot No. 90, and a half interest in lots and fractional lots Nos. 39, 40, 91, 92, 93, 94; a deed from Jones to Linton to one half of lot No. 39; also a deed from Gilbert. executor of Collier, to Linton to the north half of No. 42. and fifteen acres of the north-east corner of No. 89; also a deed from J. W. Gleaton to Linton, to the north half of No. 41; also a deed from J. P.Cox to Linton to parts of lots Nos. 25 and 26, as appears by the map; also a deed from A. L. Holliday to Linton to the north half of Nos. 96 and 147 and fractional lot No. 146 on which Holliday resided; also a deed from H. Nichols to Linton to fractional lots 147 and 148and south half of 143 and 96; also a deed from Haiden et al., administrators, to Linton to lot No. 95, containing 2021 acres.

The following parol testimony was introduced by defendant:

Rouse testified, in brief, as follows: Holliday owned the north half of No. 96, and J. D. Deriso owned the north half of No. 89; these were known as the Holliday and

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Deriso lands; and in order to make the Holliday and Deriso line, the south boundary of the tract, land lot No. 95 must be included therein. The fraction on the river west of Nos. 95 and 96 belongs to the widow Deriso and some children: never belonged to Linton: it runs to the river and cuts off No. 95 and a small part of 94 from the river. Linton held all the land which the witness pointed out as the upper settlement, before the deed to Rowley. wards, in the fall or winter, Linton bought the north half of 96, 143, 147 and 148, from Holliday, and afterward purchased the balance of these lands from Nichols. Some time before the making of the deed made by Linton in settlement of the two mortgages, he was engaged in making a calculation, and told Rouse that he had been trying to see if he could not make 1760 acres of land in his upper settlement as specified in his mortgage to Rowley, without including 95, and that it fell short 40 acres; he also asked Rouse to keep it a secret.

Harris, the defendant, testified, in brief, as follows: The notes sued on were given for the purchase money of the property; the land was valued at \$5.00 per acre; the note was transferred after due; all was paid except \$1000; he went into possession at the time of the purchase, and is so yet; did not know of the mortgage when he bought from Linton, but thought the title was good. Afterwards Rowley told him that he had bought the land in satisfaction of the mortgage and would evict defendant. Defendant found that he did not have good title, and then bought from Rowley and gave a note for the purchase money at \$6.00 per acre; all has not yet been paid.

Rowley testified that the mortgage given by Linton and the deed from him, and the deed from the sheriff included lot No. 95; that Linton's agent pointed out the southern line to him at the time of the transaction, and it ran along the land line between 95 and 90 on the north, and 96 and 89 on the south; that the northern parts of 96 and 89 were known as the Holliday

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and Deriso lands; and that he never heard of any claim to the contrary until Linton wanted to sell to Harris; that what was called the upper place, and was included in the mortgage, had the Holliday and Deriso lands on the south, and what was called the lower place came up to the southern line of No. 95; that he also had a small mortgage on the lower place, but it was paid off; that he had the upper place surveyed, and it fell short of the amount called for in the mortgage 164 acres.

The defendant introduced in brief, the following evidence:

Hobbs and Smith testified that the Rowley and Craig mortgages were placed in the hands of Hobbs for foreclosure; that Linton filed a plea of usury, and the matter was settled by Linton's making an absolute deed to the mortgaged premises, but in order to protect him against any judgments against Linton, Rowley was to have the right to foreclose, which he did.

Linton testified that lot number 95 was not included in the mortgage or the deed made in settlement of it; that he pointed out the lines to Rowley and Craig and went to them, except where it was boggy; that number 95 was connected with the Holliday and Nichols place, the "settlement" being on the Holliday land, and the whole place was called the Holliday place; that if number 95 were included in the mortgage, there would be too much land. [The language of the record is, "the mortgage would have called for over 1,700 acres instead of over 1,700 acres"]; that in making the mortgage and deed he made a mistake of forty acres, the quantity being stated at 1,760, when it should have been 1,720 acres, more or less.

Plaintiff having died, his executor was made a party.

The jury found for the defendant. Plaintiff moved for a new trial on the following grounds:

- (1.) Because the verdict was contrary to law and evidence.
  - (2.) Because the court admitted testimony of defendant

#### Harris re. Hull. executor.

that he had the land surveyed and it fell short of 1,760 acres by 160 acres.—Objected to because he did not make the survey and could not state its result.

- (3.) Because the court rejected evidence offered to show that the debt to settle which the deed was made was infected with usury.
- (4.), (5.) Because the verdict was contrary to the charge: \* \* \* " If the lands mortgaged were deeded by the mortgagor, Linton, to Rowley, and accepted by him in full satisfaction of the mortgage, before foreclosure, the subsequent foreclosure would not have legally affected the right of Harris, and an eviction under such foreclosure would not avail Harris in this suit. If he knew of this satisfaction of the mortgage, this rule would not be changed by the agreement of Linton and Rowley, that said mortgage might still be foreclosed to perfect the title or to prevent other judgments or liens from affecting the mortgaged premises in the hands of Rowley. The plaintiff insists that the evidence shows that the mortgaged debt was paid, and that a sale under the mortgage fi. fa. did not legally evict Harris, nor could disturb legally his possession. That his vielding to such sale and attorning to Rowley was illegal, whether he (Harris) knew the true facts or not."
- (6.) Because the court then added the following qualification: "If he (Harris) knew of this satisfaction of the mortgage."—Plaintiff insists that the mortgage and f. fa. were dead, and the ignorance of Harris of the payment could not revitalize the transaction, so as to give Rowley any right against Harris that he did not have against Linton, his vendor, under the agreement.
- (7.) [Request refused and certified to be substantially covered by the charge.]
  - (8.) [Substantially the same as (6).]
- (9.) Because the court charged as follows: "If the evidence should, under this rule given you, show that this lot 95 was embraced in the first sale to Rowley, and that Harris afterwards bought it, not knowing of the

#### Harris vs. Hull, executor.

first sale, and paid a fair value or gave his note, and Harris bought the land from Rowley to protect his title, and paid for it an amount equal or in excess of the amount still due on the note, then you should find for the defendant. Plaintiff insists that the evidence shows that Harris took possession in 1871 and retained possession for over twelve months, until after the sheriff's sale in 1873, without actual notice of Rowley's claim up to that time; and that Rowley's deed was not recorded within one year; that this state of facts gave Harris a better title under the registration laws than Rowley's."

The motion was granted, and defendant excepted.

On the argument, counsel for both parties united in a request that the principles which would govern the case be decided without appealing to the discretion of the judge in granting new trials.

- G. J. WRIGHT; D. H. POPE, for plaintiff in error.
- R. Hobbs; D. A. Vason, for defendant.

HALL, Justice.

1, 2. This case has been tried three times, and each trial has resulted in a verdict for the defendant. The last verdict was set aside and a new trial ordered by the judge presiding, and to this judgment exception is taken. Inless there was some error of law prejudicing the plaintiff, this verdict should not have been set aside, especially as the evidence, to say the least, was conflicting, and there was enough in it to authorize, if not to require, the finding It is certainly to the interest of parties, as well as the public, that there should be an end of litigation. One great purpose in establishing this court was to terminate suits, and with this view, it is made its duty not only to grant judgments of affirmance or reversal, but any other order direction or decree required, and if necessary to make a final disposition of the cause (Code, §218), and it is em-

#### Harris re. Hull, executor.

powered to give to the cause in the court below such direction as may be consistent with the law and justice of the case. Ib., §4284. Litigation should never be protracted where this, with due regard to the rights of parties, can possibly be avoided. Interest rei publicæ ut sit finis litium is a maxim so old that its origin is hidden in a remote antiquity, and the policy which it inculcates is so essential as not to admit of question or dispute.

This suit is prosecuted to recover the amount of a promissory note given by the defendant to John S. Linton for the purchase money of lot of land number 95, in thedistrict of Worth county, and by him transferred after it became due to plaintiff's testator, who in his lifetime instituted suit thereon. The defence set up to the suit, was that the land was encumbered by a mortgage given by Linton to one Rowley previous to the sale to defendant, and which fact became known to defendant some time after the purchase and after he had occupied and improved the premises; that he has been compelled to surrender the land to the purchaser under the mortgage, and to repurchase it at an advanced price, and hence the consideration for which the note sued on was given, has entirely failed. The mortgage to Rowley called for seventeen hundred and sixty acres of land, contained within certain boundaries. and being the lands which Linton purchased from divers persons named therein, among whom was Terrell T. Monger. The land was described as bounded on the north by Swift creek, on the west by Flint river, and on the south by the Holliday and Deriso lands. If the description by metes and bounds is to control, and not that contained in the deeds referred to in the mortgage and in the deed subsequently made in the settlement and extinguishment of the mortgage, then it is conceded that the defence is well founded, unless it be true, as contended, that by following the description by metes and bounds, the mortgage would cover more land than the quantity called for, by one hundred and sixty acres, or than the deed made in extin-

#### Harris vs. Hull. executor.

guishment and settlement of the same, which was for seventeen hundred and twenty acres, would give an excess of two hundred acres above the quantity conveyed. Rowley testifies that he caused the land to be surveyed and measured, and according to that measurement it required lot number ninety-five to make the quantity conveyed to him-All the other deeds referred to in the mortgage as descriptive of the lands included in the mortgage, except that from Monger, were present at the trial, and these documents, it is insisted, including Monger's deed, showed that Rowley, got the quantity of land conveyed by the mortgage, less forty acres, and the precise quantity conveyed by the deed given him in settlement of the mortgage. shown that Rowley viewed the premises and made an inspection of the boundaries before taking the mortgage; that Linton's agent pointed them out, especially the southern boundary, about which alone there is in this litigation any The map in evidence makes it plain that the Holliday lands consisted of lots 143 and 96, and to the east of this last lot, and adjoining it, is the Deriso lot number 89. Lot 95 lies directly north of Holliday's eastern lot. 96, and north of that lies number 94, which no one disputes is included in the mortgage, and lots 90, 91 and 92. which are also unquestionably in that instrument, lie directly north of 89, the Deriso lot. Under well settled principles of law, it would seem that this verdict was not only authorized but required by the evidence in the case. It is well settled that, in construing conveyances of land, effect is to be given to every part of the description, if practicable; but if the thing intended to be granted appears clearly and satisfactorily from any part of the description, and other circumstances of description are mentioned which are not applicable to that thing, the grant will not be defeated, but those circumstances will be rejected as false or mistaken. What is most material and most certain in a description shall prevail over that which is less material and less certain. "Thus courses and dis-

#### Harris vs. Hull, executor.

tances shall yield to natural and ascertained objects." "Indeed, it seems to be a universal rule that course and distance must yield to natural, visible and ascertained objects." This rule is founded "upon the legal presumption that all grants and conveyances are made with reference to an actual view of the premises by the parties thereto." This presumption is strengthened in this case by the fact that an actual view of the premises was had before the conveyance was taken. Again, "whenever in the description of land conveyed by deed, known monuments are referred to as boundaries, they must govern, although neither courses nor distances nor the computed contents correspond with such boundaries." These are the rules of law applicable to this case, as laid down by Mr. Tyler in his work on the Law of Boundaries, pp. 119, 120, which he supports by copious references to cases. Add to these the rule that where all other means of ascertaining the true construction of a deed fail, and a doubt still remains, that construction must prevail which is most favorable to the grantee," (1b., 123, and cases cited), and we think that the defence made in this case becomes complete, if not irresist-See also 20 Ga., 689; 54 Ib., 608. In so far as the charge of the presiding judge, therefore, gave preference to the description contained in the deeds referred to in the mortgage and the deed made in settlement thereof, in stead of the boundaries specified therein, it was error, but error that did not hurt the plaintiff.

- 3, 4. The other exceptions made by the plaintiff to the rulings of the court in admitting and rejecting testimony are not well taken, the grounds upon which they were made are not sustained by the facts in evidence. As to one of them, it has been repeatedly determined by this court, that a deed given in payment of a debt, although usury may have entered into the consideration, is not thereby rendered void, it is otherwise where the deed is given to secure a debt.
  - 5. Such of the plaintiff's requests to charge as were re-

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fused by the court ought, upon the principles herein determined, to have been refused. The judgment of the court below granting the new trial was, under all the circum stances, erroneous, and must be reversed.

Judgment reversed.

# APPENDIX.

### MORTALITY TABLES.

The number of cases involving the expectation of life and the estimation of the value of services totally or partially lost, have become so important a branch of litigation that the Reporter deems it not improper, for the convenience of the bar, to publish three of the leading standard tables bearing on this subject. They were tabulated by experts from an examination of a large number of cases and an average formed from them. I also present the table for the calculation of the value of annuities from Reese's Manual. This is published through the courtesy of Hon. Wm. M. Reese. These tables have been held admissible in evidence. See 66 Ga., 259; 41 Ib., 223; 52 Ib., 410; 62 Ib., 306; 38 Ib., 409.

On examination of various publications of the mortality tables, slight differences in fractional parts of years appear, doubtless resulting from typographical errors. To eliminate these, as far as possible, and present an accurate publication of the standard tables, I have made a careful comparison of the "Blue Book," the Insurance Year Book, the appendix to Scribner on Dower, and the figures in daily use by the agents of leading life insurance companies.

## NORTHAMPTON MORTALITY TABLE.

(Expectation of Life, According to the Observations Made at Northampton by Dr. Price.)

AGE.	Expectation Years.	AGE.	Expectation Years.	AGE.	Expectation Years.	AGE.	Expectation Years.
0	25.18	25	30.95	49	18.49	73	7.33
1	32.74	[26	<b>3</b> 0. <b>3</b> 3	50	17 99	74	6.92
2	37 79	27	29.82	51	17.50	.75	6.54
3	39.55	28	29.30	52	17.02	76	6.18
4		29	28.79	53	16.54	77	5 83
5	40.84	30	28 27	54	16.06	78	5.44
6	41 07	31	27.76	55	15.58	79	5.11
7	41.03	32	27.24	56	15.10	80	4 75
8	40 79	33	26.72	57	14.63	81	4.41
9	40.36	34	26.20	58	14.15	82	4 09
0	39.78	35	25.68	59	13.68	83	3.80
1		36	25.16	60	13.21	84	3.58
2		37	24.64	61	12.75	85	3.37
3	37.83	38	24.12	62	12.28	86	3.19
4	37.17	39	<b>23.6</b> 0	63	11 81	87	3.01
5	36.51	40	23.08	64	11.35	88	2.86
6 7	35.85	41	22.56	65	10.88	89	2.66
7		42	<b>22.04</b>	66	10.42	90	2.41
8	34.58	43	21.54	67	9.96	91	2.09
9	33.99	44	21.03	68	9.50	92	1.75
<u>o</u>	33.43	454.	20.52	69	9.05	93	1.37
1	32.90	46	20.02	70	8,60	94	1.00
2	32.39	47	19.51	71	8.17	95	0.75
3 4	31.88 <b>≺</b> 31.36	48	19.00	72	7.74	96	0.50

## CARLISLE MORTALITY TABLE.

(Expectation of Life at Ages Named According to the Observations Made at Carlisle by Dr. Heysham.)

AGE.	Expectation Years.	Expectatio Years.		AGE.	Expectation Y ars.	AGE.	Expectation Years.	
<u> </u>	38.72	26	37.14	52	19.68	78	6.12	
L	44.68	27	36.41	53	18.97	79	5.80	
Z	47.55	28	35.69	54	18.28	80	5.51	
3	49.82	29	35.00	55	17.58	81	5.21	
4	50.76	30	34.34	56	16.89	82	4.93	
D	01.20	31	33.68	57	16.21	¦8 <b>3</b> .	4.65	
в	51.17	32	33.03	58	15.55	84	4.39	
7	50.80	33	32.36	59	14.92	85	4.12	
в	50.24	34	31.68	60	14.34	86	3.90	
Ð	49.57	35	31.00	61	13.82	87	3.71	
D	48.82	36	30. <b>32</b>	62	13.31	88	3.59	
1	48.04	37	29.64	63	12.81	89	3.47	
Z	47.27	38	28.96	64	12.30	90	3.28	
3	46.51	39	28.28	65	11.79	91	3.26	
4	45.75	40	27.61	66	11.27	92	3.37	
5	45.00	41	26.97	67	10.75	93	3.48	
B	44.27	42	26.34	68	10.23	94	3.53	
7	43.57	43	25.71	69	9.70	95	3.53	
<b>8</b>	42.87	44	25.09	70	9.18	96	3.46	
9	42.17	45	24.46	71	8.65	97	3.28	
0	41.46	46	23.82	72	8.16	98	3.07	
1	V 40.75	47	23.17	73	7.72	99	2.77	
2	40.04	48	22.50	74	7.33	100	2.28	
3	39.31	49	21.81	75	7.01	101	1.79	
4	<b>3</b> 8.59	50	21.11	76	6.69	102		
5		51	20.39	77		103		

## ACTUARIES' MORTALITY TABLE.

# (Based upon the Mortality Experience of Life Assurance Companies, Collected by the Institute of Actuaries. 1869.)

AGE.	Expectation Years.		Expectation Years.	AGE.	Expectation Years.	AGE.	Expectation Years.	
0	57.64	25	38.44	50	20.51	75	6.56	
1	56.6 <del>4</del>	26	37.65	51	<b>1</b> 9.84	76	6.17	
2	55.64	27	36.93	52	19.17	77	5.85	
8	55.09	28	36.18	53	18.50	78	<b>5.4</b> 8	
4	54.83	29	35.47	54	17.81	79	5.22	
5	53.83	30	84.75	55	17.14	80	4.93	
6	53.08	31	34.04	56	16.53	81	4.61	
7	52.67	32	33.30	57	15.90	82	4.36	
8	55.17	33	32.59	58	15.26	83	4.04	
9	50.80	34	31.86	59	14.64	84	8.84	
10	49.89	35	31.15	60	13.99	85	3.58	
11	49.38	36	30.41	61	13.42	86	3.4 <del>4</del>	
12	48.38	37	26.69	62	12.83	87	3.26	
13	47.50	38	28.97	63	12.26	88	3,05	
14	46.60	39	28.27	64	11.72	89	2.94	
15	45.90	40	27.57	65	11.17	90	2.68	
16	45.14	41	26.85	66	10.65	91	2.46	
17	44.23	42	26.14	67	10.12	92	2.25	
18	43.39	43	25.42	68	9.61	93	2.34	
19	42.64	44	24.69	69	9 13	94	2.90	
20	41.98	45	23.98	70	<b>8.6</b> 8	95	1.90	
21	41.23	46	23.27	71	8.16	96	1.06	
22	40.51	47	22.57	72	7.65	97	1.00	
23	39.8 <del>4</del>	48	21.89	73	7.24	98	0.50	
24	39.15	49	21.20	74	6.83	1		

TABLE

SHOWING THE VALUE OF ANNUITIES ON SINGLE LIVES ACCORDING TO THE CAR-LISLE TABLE OF MORTALITY.

36	1		18			1 %	1	1 1	36	1 1	
A	6 per ct	7 per ct	₹	6 per ct	7 per ct	¥	6 per ct	7 perct	4	6 per ct	7 pr ct
0	10 439	9.177	_			_					
1	12.078		27	13.275	11.832	53	9.988	9.205	79	4.040	3.883
2	12 925	11.342	28	13.181	11.759	54	9.761	9.011	80	3.858	3 713
3	13.652	11.978	29	13.096				8.807	81	3.556	3.523
4	14 042	12.322	30	13.020	11.636	56	9.280	8.595	82	3.474	3.352
5	14.325	12.574	31	12.924	11 578	57	9.027	8.375	83	3.286	3.174
6	14.460	12.698	32		11.516	58	8 772	\$.135	84		2 999
7	14.518				11.448			7 940	85		
8	14.526					60	8.304	7.743	86		
9	14.500				11.295		8 108		87		
10	14.448		36						88		
11	14.384		37		11 124			7.229	89		2.344
12	14.321							7.042	90		
13	14.257							6.847	91	2.248	2 180
14			40		10.845	66		6.641	92		2.266
15	14,126		41	11.890		67	6 803	6.421	93		
16	14.067	12.429	42		10.671	68	6.546	6.189	94	2,492	2.419
17	14.012			11.668				5.945		2 522	
18	13.956				10.494			5.690	96	2.486	
19							5.704		97	2.368	2 309
20	13.835				10.292		5.421	5.162	98	2.227	2.177
21	13.769		47		10.178				99	2.004	1.964
'22	13:697									1.598	
22	13 621		49			75				1.175	
24	13 541		50								
25	13.456					77				0.314	0.312
26	13.368	11.964	52	10 208	9.329	'78	4 238	4.067			

To obtain the Value of a Life-Estate or Dower, and the Value of a Reversionary Interest.

Estimate the value of the property in which the life-estate or dower is held, then find its yearly value at 6 or 7 per cent. on the rate agreed upon, multiply this result by the figures in the table above (Carlisle's the most accurate), opposite to the age of the life-tenant under the 6 or 7 per cent. column, as the case may be. The reversionary interest is obtained by subtracting the value of the life-estate from the value of the property. To illustrate: A person aged 55 years is life-tenant in a property worth \$25,000; at 6 per cent. she would be entitled to \$1500 00 per annum. What is the life-estate and reversion in this property worth? Multiply this \$1500.00 by the figures 9.524 taken from the table, according to the above directions, and the result is that the life-estate is worth \$14,286. The difference between that and the \$25,000, the value of the whole estate, gives \$10,714 as the value of the reversion. To illustrate by another example: A woman aged 21 years has dower in a tract of land worth \$46,250; one-

third of this is \$15,416.66%, in which the widow has a life interest. At 6 per cent. she would be entitled to an annuity of \$925.00; this sum multiplied by 13.769, taken from the table, as above directed, gives the value of the dower, viz: \$12,736.33. This table may be used to estimate the value of lives of persons, for the destruction of which compensation is sought by interested parties.

(Where death results from an injury, the capacity to earn money per annum is to be proved; where death does not result, but the power to labor and earn money is lessened, the amount of such diminution per annum should be proved. Rep.)

# IN MEMORIAM.

### MEMORIAL OF HON. BENJAMIN H. HILL.

On May 1, 1883, the committee appointed at a meeting of the bar of Atlanta, to prepare an appropriate memorial of the life and services of the Honorable Benjamin Harvey Hill, deceased, submitted the following report:

ATLANTA, GEORGIA, May 1st, 1883.

To the Honorable Supreme Court of Georgia:

So soon as it was amounced that the Honorable Benjamin Harvey Hill was dead, the members of the bar of this city held a meeting, at which the undersigned were appointed a committee to prepare and present to this court some appropriate memorial of Mr. Hill's life and character as a lawyer, and to ask that it be spread upon the records of this court, as an enduring tribute to his memory from the members of a profession which he did so much to dignify, elevate and adorn.

This duty would have been performed earlier, but circumstances which the committee could not well control have led to its postponement until the present time, and we now ask to submit the following report:

Benjamin Harvey Hill having been for many years a distinguished practitioner at the bar of this court, it is eminently fitting and appropriate that its records should contain some lasting memento of his unsurpassed ability, his brilliant genius, and his matchless eloquence as a lawyer and an advocate.

The legal profession has been honored by some of the proudest names in the history of the world, but in all the shining list it would be difficult to find one who, in a comparatively short life, more brilliantly exemplified the learning, the honors and the successes of that noble profession than the illustrious lawyer to whose memory we offer this tribute of affection and respect. Let his honored name shine on the records of this tribunal, and let it go down to history side by side with the names of Berrien and the Charltons, Starnes and the Millers. Nisbet and Stephenses, Lumpkin and the Cobbs, Warner and the Doughertys, Cone, Colquitt and Holt, and the innumerable host of renowned men who, in their day and generation, shed undying lustre on their profession, and left to their survivors and the world a legacy of virtuous achievements, richer far than shekels of gold or shekels of silver.

Mr. Hill's days on earth were less than three-score years; yet where

can one be found who, in so brief a period, was more abundant in labors or grander in achievements? What lawyer ever received a better patronage; or won more victories in the court house, or enjoyed a larger professional income?

Mr. Hill read law under the direction and counsel of the celebrated William Dougherty, who, in the days of his prime, was equal to any lawyer in the state, and it has been said that Mr. Dougherty was so satisfied and charmed with the proficiency of his student that he gave Mr. Hill but one examination previous to his admission to the bar.

Mr. Hill was admitted to plead and practice law in the county of Meriwether in the year 1845, when he was twenty-two years of age. He did not have to wait and toil and grow old before becoming a lawyer, but just as soon as he had obtained license to practice and had opened an office for that purpose, with a heroic bound he vaulted into the professional lists—a veritable self-reliant knight, panoplied for the contest, and ready with invincible might and unfailing courage to break lances with the bravest, the mightiest and the best who chanced to come against him.

It has been the fate of some of the best lawyers that ever lived to pass through years of discouragement, anxiety and study in the beginning of their professional career, waiting impatiently for cases and clients; but such was not the fate of Mr. Hill. From the very outset and before he or his friends had a right to expect it, business and patrons poured in upon him from all sides, until very soon he was employed in almost every case of importance in the courts which he was accustomed to attend.

Such was the popular confidence in Mr. Hill's ability and eloquence as a lawyer, that his services were demanded in important cases all over the state and frequently in other states of the Union.

Mr. Hill's successes at the bar were extraordinary. He very seldom lost a case that ought to have been gained, and he has gained very many that ought to have been lost. He rarely found a cause too heavy to be carried by him, and when he failed, it was not for want of ability, skill or fidelity in the advocate, but because of the inherent weakness of the cause itself.

As a lawyer he was able, self-possessed, courageous and invincible. He carried judges with him by the force of unanswerable logic, and he swayed the juries by an eloquence which was absolutely resistless. Benjamin Harvey Hill seems to have always been great. He was an uncommon child; he was an extraordinary boy; he was a great lawyer; he was a matchless orator; and he was a grand statesman. His tutor said of him as a child that he could master six tasks while others of like age were accomplishing one. When he was a collegeboy, and the first honor of his class had, by common consent, been awarded to others, he purposed in his heart to win and wear it, and

with apparent ease he pushed himself to the lead; and lo! the shining guerdon was placed upon his manly and victorious brow.

In all the numerous positions of trust and responsibility which Mr. Hill occupied in his life, he never failed to distinguish himself and to honor the position. He was a Richard Cœur de Lion at the bar, an Ivanhoe before the people, and a Chevalier Bayard in the senate. When such a man dies in the full vigor of his manhood, well may the world stand still and exclaim with the Psalmist, "Behold, thou hast made my days as a hand breadth, and mine age is as nothing before thee; verily every man at his best state is altogether vanity."

We would deem this report incomplete if we failed to say that no human character, however excellent in other respects, can be perfect without simple faith and childlike trust in the saving power of the Son of God. Mr. Hill gave evidence of this faith and this trust in the last words that ever trembled upon his lips. The victorious exclamation, "almost home!" ended his speech, and wound up his utterances on earth, and enabled him to leave his family and friends indubitable assurance that his eloquent tongue, which thrilled the multitude and commanded the applause of listening senates here, has been retuned, and is employed in chanting the songs of the redeemed in the far-off land of the blest.

We append the following resolutions:

Resolved 1 That in the death of Benjamin Harvey Hill the legal profession of this state lost its ablest champion, its most eloquent advocate, and its brightest ornament.

Resolved 2. That we who survive him will treasure in affectionate memory his shining virtues and brilliant achievements, and will ever point with just pride to his character and his deeds, as a rich legacy left us for the encouragement of our hopes and our endeavors.

Resolved 3. That we will cease not to profoundly sympathize with the family and kindred of our deceased brother in the irreparable loss to them occasioned by his decease.

Respectfully submitted by

GEO. N. LESTER,
N. J. HAMMOND,
D. P. HILL,
W. H. HULSEY,
M. J. CLARKE,
JULIUS L. BROWN,
HENRY JACKSON,
Committee.

## Chief Justice Jackson, responded as follows:

In responding to the report and resolutions in honor of Mr. Hill, I can add nothing to the remarks made by me at the meeting in this building in this city immediately subsequent to his decease. Those remarks are as follows:

Mr. Chairman: The wreath of beautiful immortelles which encircle the brow of the illustrious dead was woven of flowers culled not more from the broad fields of political adventure and civic glory than from the narrower gardens of legal lore and forensic renown. It is meet, therefore, that, in response to the invitation of the committee of arrangements, as Georgia's head of the administration of her laws, I add a few words to what has been said in honor of his memory.

Less than twelve months ago the State was draped in weeds of mourning, and, with the circle of the entire sisterhood, she bowed her head in sorrow and wept over the fresh grave of the chief magistrate of the Union. The rude and ruthless "manner of his taking off," the protracted, weary and sad footsteps of the great sufferer through the dark "valley of the shadow of death," the patient heroism with which he endured the anguish, and the painful suspense with which the people breathlessly watched the event—all struck the great chords of the American heart with almost unutterable sympathy, and its sobbing vibrations made a spontaneous and indignant wail throughout the land. It was fit, sir, that Georgia officially take her place in that funeral, and she did so from her heart. In this chamber her legislative, executive and judicial departments of government—the mayor and council of her capital city, and her citizens generally, assembled, and Georgia's voice was heard in the general lamentation.

But Garfield, Mr. Chairman, was not Georgia's child. He was the son of one of her sisters, and as one of a great family she sorrowed then. To-day she grieves with a mother's love and a mother's anguish. She stands now by the bier of her own boy—the offspring of her womb, whose cradle she rocked, whose footsteps she watched as only a mother can watch a son, in whose growth she expanded, too, in parental pride, and in the altitude of whose fame she gloried as her own.

Well may she weep! "Can a mother forget her sucking child?" is the question Jehovah put, to manifest his unspeakable love for the children of men. Mr. Hill sucked everything that made him great from the breast of Georgia. He was all Georgian. Physically, mentally, morally he was Georgia's own son. In the midst of the great red belt which encircles the body of the State from the Savannah to the Chattahoochee—her rich red zone—near the geographical center—the very core of her heart—his eyes first saw the light, and the blood which fed his magnificent physique flowed from the heart which are

throbs with anguish over his remains. Intellectually he was her own son. An alumnus of her university, there he sucked intellectual nourishment, and Athens is in tears now while Atlanta weeps. If honey hung upon his lips, Georgia bees gathered it from her own flowers and hoarded it there. If the silver ring of his eloquence fascinated attention and moved all hearts with the magic of its music, that silver was dug from Georgia's mines beneath her own red hills. If the sword of his logic, wielded for her in the senate chamber of the Union, flashed and cut like a Damascus blade, the material was Georgia steel, manufactured and tempered in her own workshops. If the broad shield which he raised there in her defense, and in that of all the South, averted every blow and blunted the point of every javelin her traducers hurled at her honor and her heart, the material of it was the sturdy oak and the granite mountain, native to Georgia's soil. Oh, sir, this great Georgian was altogether Georgian, and while his patriotism did expand and compass the Union in its wide embrace, his heartstrings clustered closer to the mother who was all in all to him!

True patriotism always did, and always will, burn brightest at the fireside. Thence its rays will shine over all the land and warm all the homes within the reach of its radiance, to the remotest verge of the whole country. If it burn not there, at home, it will warm nothing. Morally, Mr. Hill was Georgia's own son. In a Georgia church, under Georgia preaching, a spark from heaven fell into his soul and kindled that humble faith in Christ which adhered to him through life and made him grand in death. Well might he say with the Psalmist, "Thy gentleness hath made me great." And that flow of God's spirit into his own made the greater grandeur of the evening of a grand day.

Sir, his career was not unlike the course of the sun in the heavens—its morning, its noon, its setting in a cloudy west. When it arose, the broad beams of its light, as they brightened the morning sky, gave early promise of a glorious zenith. Well do I remember how the prophetic eye of Judge Charles Dougherty—clarum et venerabile nomen—watched those beams and delighted in their promise. Steadily it rose higher and higher. The bar, the forum, the hustings, legislative and congressional halls, all, were flooded with the illumination; and when full orbed, it culminated in the zenith, when all eyes looked at Georgia's Senator in the American senate, not Crawford or Troup—not Forsyth or Berrien—illustrated Georgia with a richer—I had almost said, sir,—with so rich a radiance.

There he shone a sun with no spot upon its disc! But evening came, and the sun set to rise no more on earthly scenes. It is not the clear, tranquil sun that is most beautifully grand. It is when clouds encompass the king of day that he draws the richest drapery around his couch, and more beautiful than morning's beams, grander than

noontide's glory, is the light the sinking sun sheds on the clouds which skirt the horizon he has left.

Mr. Hill sank among clouds of deep affliction, and the twilight walong, but oh! how surpassingly beautiful that lingering glory! God seems to have brought the clouds around that dying chamber that the glory of heaven might sweeten the sorrows of earth, and that the world might see, as Addison wrote to his young friend, how a Christian could die. Mr. Chairman, it was my fortune to be at Eureka Springs when Mr. Hill was there. Though in feeble health myself, it was a pleasure, as well as a duty, to visit him often. There he sat afflicted, yet patient and lamb-like. There was the wife whose widowed heart now is groaning in that residence on Peachtree street, and there the noble son who laid all he had—time, property, business, home, everything at his father's feet. Well might the great sufferer say, as he said to me, never had husband a better wife—never had father a better son.

I looked from the outward to the inner man, and asked how was all within. "I should like to live for my family and my country, but I make no prayer to God without saying to Him from my heart, 'Thy will be done.' I know He is wiser and better than I am, and will do best for me and mine."

That was his reply, and every time I saw him thus trustingly, humbly, confidently, he talked.

On my return, I saw him again at his home, and when he could not talk, he wrote again, in reply to a question as to the inner man, whilst his body was wasting away and death before him:

"The growth of grace is constant, indubitable, unmistakable."

To General Evans he said, laying his hand on his breast and pointing to heaven, "All is right here, all is right there." And to him, when no longer able to write or talk, when almost gone, with a supernatural effort, his dying whisper muttered out the words, "Almost home," whilst a smile lighted up the emaciated face.

Mr. Chairman, a death like this is worth more to Georgia's youth than all the triumphs of Mr. Hill's genius. May they profit by the wondrous example!

Would that I could add a word of comfort to yonder withered and widowed heart; and I know you, sir, and all here, respond to that prayer. I believe it was Washington Irving who compared the man to the strong, massive oak, his wife to the sinuous and tender vine that clasps all the tendrils of her love around him. The higher this great man grew, the higher, clinging to him still, grew this loving vine; and when he fell, she fell too. And still the tendrils clasp the dead trunk. Poor broken, bruised, bleeding vine! Unclasp that embrace. The noble tree is not there. A divine hand has transplanted him to a richer soil, a purer atmosphere. Lift those tendrils upward. Ere long the same divine, gentle loving hand will move thee again to his

side, and He who pronounced you one here, will re-unite you there, to grow together forever in the beauty of holiness, in the garden of the Lord.

Let the report and the resolutions be spread on the minutes of the court.

### MEMORIAL OF HON, MARTIN J. CRAWFORD.

On January 7, 1884, the committee which had previously been appointed to prepare a suitable memorial of the Hon. Martin J. Crawford, deceased, late Justice of the Supreme Court, submitted the following report:

MARTIN J. CRAWFORD was born in Jasper County, Georgia, on the 17th day of March, 1820. His father, Maj. Hardy Crawford, was a practical and successful farmer and a politician of considerable influence in Middle Georgia. His mother, Betsy R. Jenkins, was a lady of great piety and excellence. He was placed under the care and instruction of Rev. Otis Smith at Brownwood, near LaGrange. Georgia, and was carefully and thoroughly taught. Afterwards he was a student at the Mercer University, but did not remain long enough to graduate. His parents removed from Jasper and settled in the county of Harris, and there died and were buried. Judge Crawford began the study of law at a very early age, and was admitted to the bar by a special act of the Legislature before he was nineteen years old. He commenced to practice at Hamilton, and remained there until 1849, when he moved to Columbus and made that city his home. He was elected to the Legislature from Harris, serving one term with distinction. In 1853, he formed a partnership with Porter Ingram, Esq., and with only such interruptions as were caused by his public duties, continued to practice with him for about twentyfive years. In 1854, and in his thirty-fifth year, he was appointed by Governor H. V. Johnson to the office of Judge of the Superior Court of the Chattahoochee Circuit, to fill the vacancy occasioned by the election of Judge Iverson to the United States Senate.

Perhaps no bar in the state was stronger than the Columbus bar at that time. It might be said literally, there were legal giants in those days.

Judge Crawford was still a young man, and having a considerable fortune, he had not applied himself very closely to his profession. So that he could not be considered an experienced lawyer when he went upon the bench. Yet, even under such adverse circumstances, by his sound judgment, dignified manners and unwavering integrity he commanded respect and confidence, and after a service of only

one year retired with considerable reputation. It is seldom we find a man possessed of more of the qualities which go to make a judge than Martin J. Crawford. Polished, dignified and courteous, he was able to enforce obedience without resorting to power. Having a clear perception of the principles of the common law, a patience in hearing and a willingness to learn from argument and precedent, and a fixed determination to decide according to the very right of the case, his decisions were always respected and seldom reversed. In 1855. he was nominated by the Democratic Party as its candidate for Congress against the Know-Nothing or American Party. This was the first time these parties had opposed each other in a congressional race, and it was generally believed that Judge Crawford led a forlorn hope. But he entered upon the canvass with such zeal and ability and had so many strong personal friends amongst his adversaries, that he was elected by a fair majority. So well did he acquit himself in Congress that he was elected two successive terms, and was still a member when the state seceded from the Union.

He was selected by the legislature as one of the delegates from Georgia to the provisional Congress of the Confederate States at Montgomery, Alabama, and was afterwards appointed by President Davis, together with the Hon. John Forsyth of Alabama, and Gov. Roman of Louisiana, on the peace commission to the United States Government. Feeling it to be his duty to serve his country in war as well as in peace, he raised a regiment of cavalry and was elected colonel, and remained with them until by the fortunes of war he was captured near Louisville, Kentucky.

In common with his fellow citizens he found himself, at the close of the war, deprived of most of his fortune, but without stopping to complain or bewail his loss, he entered again upon the practice of the law with his old partner, and continued to follow his profession with diligence and success until 1875, when he was again appointed judge of the Chattahoochee Circuit. Judge James Johnson had resigned, and Governor James M. Smith had appointed him to fill the vacancy. For five years he filled that most trying and important position, and so earnest was he to administer the law without fear or favor that he gave the highest satisfaction both to the bar and the people. In 1880, he was appointed by Governor Colquitt one of the Associate Justices of the Supreme Court.

Looking at the matter as it affected himself, it may be feared that Judge Crawford made a serious mistake in accepting this position. He was already filling the lighter but scarcely less important duties of Judge of the Superior Court, which he could do and still remain with his family and friends. He greatly enjoyed social intercourse and the comforts of home. Whether the higher honors he received as Judge of the Supreme Court, burdened as it was with a labor so severe and continual as almost to exclude him from society and deprive

him of rest, was a sufficient recompense for the sacrifices he made, admits at least of a very grave doubt, and whether the effects of these labors did not tend to shorten his life is a still more serious question. For three years he was an honored and useful member of this court. As a judge he was conscientious and laborious. He made it a point to understand fully the facts of the case before him, and to find them out he dug deeply into the records.

His decisions are clear and concise, and bear the evidences both of learning and labor. It was characteristic of him always to do his best: whatever he undertook he considered should be well done, and therefore he gave to it all his ability. For this reason Judge Crawford never made a failure. In whatever position he was placed he appeared to advantage, because he made it a point always to succeed. This rule he carried with him upon the bench, and its effects can be seen in all his decisions. At the close of the last term of this court, and after finishing up all his duties, Judge Crawford returned home for rest and recreation. He had planned an extensive tour for the summer, and was looking forward to it as likely to afford both benefit and pleasure. Though never a robust man, yet he had by great prudence and self-denial so preserved his health and strength as to be still in the full enjoyment both of bodily and mental vigor. His fellow citizens held him in high esteem, and considered him worthy not only of the honors already received, but of still higher positions of trust. Truly it can be said that he was in the very midst of life. No man seemed more secure in the present or more promising in the future. Thus did he return to his home and meet his family and friends. But whilst their greeting was still warm, and he was still in the very bosom of his family, he was stricken with disease. For days and weeks he lay upon his bed. All that skill could suggest and loving hands could execute, was done for him; but slowly and steadily he wasted away, until on the 22d day of July, 1883, and just as the Sabbath day was drawing to a close, Martin J. Crawford died.

He was buried in the cemetery at Columbus, where he was so highly esteemed in life, and where his name and memory will ever be honored. The public life of Judge Crawford was one of which his family and friends are justly proud. It was without spot or blemish. His hands were clean, his character unsullied.

In 1842 Judge Crawford married Miss Amanda J. Reese, a sister of Judge Augustus Reese, of Morgan, and lived with her in great happiness for forty-one years. By her he had five children; the first died in its infancy, the second just as she was budding into womanhood. His three sons survive him, and to them he leaves as the richest heritage, a spotless and honorable life. As a husband he was loving and true; as a father he was watchful and kind. His wife was his onfidant, his boys were his friends and companions. His knowledge

of the world, his strong common sense and cool judgment, rendered him a most valuable counsellor and friend. His keen sense of humor, his genial manner and extensive information, made him a most desirable companion. In the highest and best meaning of the word, Judge Crawford was a gentleman. He was incapable of a mean or unworthy act. With him the question was, "What is the right thing to do?" And in coming to a conclusion, he did not allow his interests to control his judgment. The public good was of greater importance than his own, and he preferred to be right rather than to be popular. The life of such a man is a blessing, not only to his family and friends, but to the whole state, and his death is a public calamity.

These facts the committee submit to the court and respectfully ask. that such action may be taken as will testify to his family, to his friends, and to the public, the appreciation in which this court has to the character and services of Martin J. Crawford.

John Peabody, Chairman.
James M. Smith,
L. E. Bleckley,
A. M. Speer,
W. A. Hawkins,
Wm. M. Reese,
A. T. McIntyre,
John W. H. Underwood,
Hugh Buchanan,
Committee.

# Chief Justice Jackson responded as follows:

Gentlemen of the Bar: In responding to the report and resolutions in honor of my deceased colleague and friend, respect and affection mingle in my thoughts. Respect, because in a long and useful life, he added lustre to a name already famous in the annals of Georgia. Wm. H. Crawford, George W. Crawford, Martin J. Crawford, the last of a trio which made one name illustrious and illustrative of the state, has gone. The first, a senator in congress, American minister to France, secretary of the treasury of the United States, and prevented only by a stroke of paralysis from the presidency of the Union, went to the grave full of honors as of years, with Georgia's ermine around him as Judge of the Northern Circuit and president of the convention of judges when they assembled in banc to make the final exposition of the law of the state, prior to the organization of this court. The second, representative for years in the general assembly from the county of Richmond, governor of the state, secretary of war of the United States—as law-maker, as chief magistrate, as cabinet minister, contributed to the glory of the Crawford name, and added rays to the star which represents Georgia in the constellation of the old thirteen states, set by the fathers to shine forever on the cerulean canopy that

covers freedom as it floats over land and sea. The third, the subject of your memoir, representative in the general assembly, Judge of the Superior court of the Chattahoochee circuit, representative in congress, delegate from Georgia to the convention of southern states which made the Confederate Union, participant in peace and war in that second struggle which "tried men's souls," commissioner of the Davis government to Washington City to adjust, if possible without bloodshed, the relations between the two governments, Justice of the Supreme Court of this state and martyr to duty to Georgia on this bench and in yonder room, where midnight oil burned to light legal lore and developed opinions stereotyped on the pages of Georgia reports, showed, by his whole life, that the blood of the Crawfords in him fed a brain as sound and a heart as true as those of the kinsmen he had buried.

The courteous gentleman, the incorruptible magistrate, the laborious judge, the conscientious guardian of the rights of all, the firm follower of honest conviction, wherever it led, the pure patriot, faithful to Georgia in the anguish of her defeat as in the pristine pride of her unpolluted sovereignty, the true friend, the contemptuous scorner of hypocrisy and guile, the husband with a single love, the father with tender sympathy and painful anxiety, the hater of vice and lover of virtue, "the chevalier without fear and without reproach," the last of the eminent Crawfords, has gone "to that bourne whence no traveler returns." Georgia will never embalm with her tears a nobler patriot or a purer man.

Of all the sons left our beloved State to weep over his bier, I shall miss him most. The lines of our lives first touched each other in the springtime of aspiring manhood—he a representative in the legislature from the county of Harris, I, from the county of Walton,—the home of my youth, the nest that warmed a fledgling's ambition, the spot of earth dearest to me. There at Milledgeville our first acquaintance was made. Ten years thereafter, those lines converged again in the city of Washington, both representing there the commonwealth of Georgia.

The strong attachment of both of us to Howell Cobb, then secre tary of the treasury, drew us often together at the hospitable hearthstone of the grandest specimen of big-headed and big-hearted humanity I have ever known; and there the ties of youthful acquaintance were drawn into a knot of friendship never to be severed.

In the evening of life we met again closely and cordially here, and everything I see reminds me of the friend I have lost. His seat on this bench, yonder rooms we occupied together, my evening walk hence to my home in which almost daily he accompanied me part of the way, the sitting-room there to which I loved to welcome him, the annual commencement of the Georgia University at Athens in our vacation, where we met and whiled away pleasant retrospections with

Professor Browne, of old Washington city scenes before the war, at business here, at home with my family, in the Chief Justice's room where we worked together, in the annual holiday of the week's reunion at General Browne's at Athens, free from care of cases and search for legal truth, here, there, everywhere, I miss the friend I shall see no more on earth.

'All living things remind me of the dead. Scarcely a day passes that something does not recall this friend of a quarter of a century. And if I visit the city of the dead, memory brings Crawford vividly before me, as his heart melted and his bosom heaved and tears flooded his face, when at his request I showed him the spot where all that was earthly of Howell Cobb was mouldering beneath the sod!

A brave heart is ever as tender, gentlemen, as that which beats in woman's breast; and beneath that faultless dress, that dignified reserve, that calm exterior, that unruffled courtesy, which characterized him, whose obsequies as a Court, of which he was an erect, strong and polished pillar, we solemnize, palpitated a heart full of human sympathy and devoted friendship. Long may love's flowers bloom on his own grave and friendship's tears freshen their fragrance!

Let the memorial be entered of record on the minutes of the court, and let the court be now adjourned in honor of his memory.

Justices Hall and Blandford expressed orally their concurrence in the sentiments of the Chief Justice, and their esteem and respect for Judge Crawford.

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- 5. Exemption subject to debt made after discharge. Ibid.

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BETTERMENTS. See Damages, 4; Estates, 5.

BONA FIDES. See Vendor and Purchaser, 1-4; Promissory Notes, 3-5, 10.

BONDS. See Appeal, 4; Certiorari, 4; Trusts and Trustees, 11-14; Practice in Superior Court, 23.

## BONDS, (Official.)

- Official bond absolute on face, after breach, no defence that it
  was left with ordinary not to be delivered until other sure
  ties signed. Lewis et al. vs. Board of Comm'rs et al., 486.
- Especially, after principal acted under bond and received public revenue. Ibid.
- Possession of bond presumptive proof of delivery; may be attacked when. Ibid.
- Power of governor, or officer under dedimus potestatem, in taking bonds, limited. Ibid.
- 5. Agreement to terms beyond bond, void. Ibid.
- Sureties estopped from setting up that other sureties were to sign. Ibid.

BOUNDARIES. See Venue, 4, 5.

BURGLARY. See Criminal Law, 37.

BY-LAWS. See Corporations, 10.

## CATTLE. See Municipal Corporations 10-12; Criminal Law, 38-40.

## CERTIORARI.

- Abating nuisance by municipal authorities, certiorari, not writ of prohibition, is remedy. Mayor, etc., vs. Minor, svng. ptnr., 191.
- From Oct. 12 to Jan. 12, more than three months. W. & A. R. R. vs. Carson, 388.
- Verdict on appeal in justice court, certiorari is to; not to judgment entered on same. Ibid.
- Bond attested by commercial notary not invalidate. Hendrix & McBurney vs. Mason, 523.
- Costs, certificate of payment of all, necessary. Osborn vs. Osborn, 716.
- 6. "Court costs," certificate of payment of, insufficient. Ibid.
- Justice court, when certiorari and when appeal proper. W. & A. R. R. vs. Dyar, 723.

## CHARGE OF COURT.

- 1. Context, charge taken with. State vs. S. W. R. R., 11.
- 2. Full aud fair in this case. Steed vs. Cruise et al., 168.
- 3. Request b sed on partial view of facts not given. Ibid.
- "Make good the damage," error to charge that railroad must, although there was contributory negligence. Central R. R. vs. B. inson, 207.
- Railroad must show "full measure of care and diligence; all that could be expected," charge too strong. W. & A. R. R. vs. King, 261.
- Substance of requests given and counsel announcing satisfied, no new trial because words of request not given. Durham vs. State, 264.
- 7. Context of charge excepted to considered. Central Railroad vs. Roach, 434. (See No. 1 above.)
  - 8. Negligence, judge should not charge that facts show. Stewart & Powell vs. Head, 449.
- · 9. Presumed correct, if not set out. Ibid.
- 10. Presumed not variant from what set out. Ibid.
- 11. Partly right, errors in must be shown. Heard vs. State, 597.
- 12. Long extract excepted to, errors must be specified. *Ibid*.
- Criminal case, court gives law in, jury applies. Bailey vs. State, 617.
- 14. Warning to crowd in court, in charge. Ibid.

- Allusion to argument of counsel improper. City of Atlanta rs. Wilson, 714.
- No evidence to authorize finding of involuntary manslaughter, no charge as to. Freeman vs. State, 736.
- 17. No evidence on subject, no charge thereon. Ibid.
- Omission to charge on reasonable doubts, new trial. Richardson vs. State, 825.

CHARTER. See Corporations, 18, 19.

CHURCH. See Trusts and Trustees, 17.

CITY COURTS. See Constitutional Law, 26-28.

#### CLAIMS.

Insufficient execution, not quashed by claimant; levy dismissed. Morton, Bliss & Co. vs. Gahona et al., 569.

#### CODE.

- 1. Error in codifying act of 1870 with §4649. Doyal vs. State, 134.
- Law embodied in Irwin's Code and recognized by constitutions
  of 1868 and 1877, not held bad because title of original act
  did not cover matter in its body. Huff vs. Markham, 284.
- "Judgment" or "verdict" on open account with personal service, under §3457. Fryer vs. Cole & Co., 687.

COLORED PERSON. See Title, 9-10.

COMITY OF STATES. See Statute of Limitations, 7.

COMMON CARRIERS. See Railroads.

COMPTROLLER GENERAL. See Officers, 2.

CONSIDERATION. See Contracts, 6; Promissory Notes, 1, 7, 8; Amendment, 3; Warranty, 1.

#### CONSTABLE.

- 1. Rule nisi against sufficient. Langley, constable, vs. Wynn, 430.
- Cannot fail to make money because initials of defendant stated wrong. Ibid.
- Rule absolute, what transpires subsequently to, hardly relieves from contempt. Ibid.

- Levy out of district of judgment or of defendant. Lewis vs. Wall, 646.
- 5 Town marshal may be constable. Ibid.

#### CONSTITUTIONAL LAW.

- Railroad allowed to take right of way and complete road at large expense, not enjoined until payment of damages. Griffin vs. Augus'a and K. R. R., 164.
- Dispossession of tenant holding over, law constitutional. Huff vs. Markham, 284.
- Law embodied in Irwin's Code and recognized by constitutions of 1868 and 1877, not held bad because title of original act did not cover matter in body. *Ibid*.
- 4. Venue: bill to enjoin trespass on realty not suit respecting title. Powell vs. Cheshire, 357.
- Act not declared unconstitutional unless clearly so. Wellborn vs-Estes. 390.
- 6. Intention of constitution sought from whole instrument. Ibid.
- Practice of departments of government considered in interpreting. *Ibid*.
- Election of judges of superior court, system of constitution of 1877. *Ibid.*
- 9. New circuit created, election of judge how assigned. Ibid.
- 10. Legislative and judicial questions compared (passim). Ibid.
- 11. Constitution of 1868 took effect when Strickland et al. vs. Griffin et al., 541.
- 12. County court judgment rendered July 21, 1868, good. *Ibid*.
- 13. County court ft fa. issued July 25, 1868, invalid. Ibid.
- Serving Nashville and Chattanooga R. R. by posting notice beside track. N. & C. R. R. vs. McMahon, 585.
- 15. Grading streets not enjoined because of damage to adjoining lot. Moore vs. City of Atlanta, 611.
- Homestead under constitution of 1868, no supplementing. Mitchell vs. Wolfe, 625.
- Homestead under constitution of 1868 not supplemented under that of 1877. Ibid.
- 18. Doubtful act not so construed as to impair rights growing out of contracts before its passage. *Ibid*.
- Subjecting trust at law is not suit respecting title. Beckwith, trustee, vs. Mc Bride & Co., 642.
- Verdict on open account with personal service, without proof. Fryer vs. Cole & Co., 687.

- 21. Unconditional contract in writing, receipt for notes to be collected is not. *I bid*.
- 22. Railroad commission constitutional. Geo. Railroad et al. vs. Smith et al., comm'rs et al., 694.
- 23 Railroad commission not legislative body; rules of legal. Ibid.
- 24 County, damages against for bad bridges, constitution of 1877 not affect right to. Moreland vs. Troup County, 714.
- 25. Taxing power of county limited. Ibid.
- City courts, uniformity of practice with county courts not required. Whittendale vs. Dixon & Bro., 721.
- 27. Title not covering body of act, what part bad. Ibid.
- 28. City court of Richmond county constitutional. Ibid.
- Streets, assessment on owner of adjoining property for pavement etc., constitutional. Hayden et al. vs. City of Atlanta et al., 817.

See Constable 5: Justice Courts, 6.

CONSTRUCTION. See Words and Phrases; Constitutional Law, 18.

See also for construction of various wills and deeds under those heads.

#### CONTEMPT.

- 1. Constable not relieved from by error in initials of defendant. Langley, constable, vs. Wynn, 430.
- 2. Rule absolute, what transpires after, not relieve. Ibid.
- Jury, on proceeding for contempt, can officer demand? Quarter lbid.
- Discretion in discharging rule not interfered with. Wikls, rec'r, vs. Silva et al., 717.

See Injunction and Receiver, 21.

#### CONTINUANCE.

- None to establish lost paper for evidence, if no reason for delay shown. Steed vs. Cruise et al., 168.
- Witness absent and laches in not obtaining evidence, no new trial. Peters et al. vs. West, gdn., et al., 343.
- Amendment not work continuance, without surprise or want of preparation. Ibid.
- 4. Discretion as to. Turner vs. State, 765.
- 5. Witness out of state as ground for. Ibid.
- 6. Sickness of one of four attorneys, not good. Ibid.
- Produce papers, continuance to give time for notice to, where no laches. Prustees of Chester, Church vs. Blount, ex'r, 779.

8. Lackes in issue, evidence necessary to determine in Supreme Court. Masland, Jr., et ux. vs. Komp et al., 786.

## CONTRACTS.

- 1. Statute of frauds, money furnished T. on credit of W., is not within. Davis, rec'r, vs. Tift, 52.
- Consideration necessary for promise to pay pre-existing debt of another. Ibid.
- 3. Consideration, promise acted on is. Ibid.
- Specific performance of written contract for land enforced. Jackens vs. Nicolson, 198.
- Auctioneer's memorandum of sale of land sufficient written contract to bind parties. Ibid.
- Note given for open account bought at risk of purchaser, assignment not made in writing, no defence when. Daniel & Co. vs. Tarver et al., 203.
- Fine for misdemeanor, note given to solicitor general, not illegal. Blain et al. vs. Hitch, 275.
- 8. Infant's note for buggy void. Howard vs. Simpkins et al., 322.
- Married woman may contract, except when; aliter, at common law. Did.
- Torts and contracts, actions on compared and discussed. City and Suburban Ruy. vs. Brauss, 368.
- 11. Tort arising from breach of duty imposed by contract. Ibid.
- Through ticket over line of transportation, liability of seller discussed. Central R. R. vs. Combs et al., 533.
- 13. Unconditional in writing, judgment by default. Fryer vs. Cole & Co., 687.
  - Substituted debtor to pay part of note, when may be sued.
     Supp vs. Fuircloth, 690.

See Fraud. 6.

## CORPORATIONS.

- Estoppel from denying incorporation by dealing with company as such. Imboden et al. vs. Etowah, etc., Mining Co., 86. (See No. 16 below.)
- 2. Estoppel from denying president, etc., dealt with as such. Ibid.
- Admissions and conversations of agent in scope of agency, admissible. Did.
- Admissions of president in connection with business of office, admissible. *Ibid*.
- 5. Mining company may protect ditch by injunction. Ibid.

- Assessment of damages for cutting ditch, that person participated in, shown against title claimed under him. Ibid.
- Estoppel of company renting water from another from denying incorporation or title of latter. *Ibid.*
- Misnomer of corporator immaterial, if proper person recognized by others. Ibid.
- 9. By-laws of benevolent association as to manner of claiming benefits, valid. *Harrington vs. Workingmen's Ben. Asso'n*, 340
- Waive right to appeal to courts, do members, by joining association where by-laws provide for reference of claims to committee? Quarte. Ibid.
- 11. Charter powers strictly construed. Singleton vs. S. W. Railroad, 464.
- 12. Alienate, mortgage or lease franchise, without special grant of power, railroad cannot. *Ibid*.
- 13. Power to lease not alone free lessor from liability. Ibid.
- Service on non-resident railroad by posting notice beside track and mailing to president. Nashville & C Railroad vs Mc Mahon, 585.
- Volunteer fire company, deceased member's heirs have no interest in fund. Mason et al. vs. Atlanta Fire Co. No. 1, 604.
- De facto company acting as corporation, estopped from denying character. Georgia Ice Co. vs. Porter & Meakin, 637. (See Nos. 1, 2, above.)
- De facto converted into de jure corporation, debt of former, latter liable for. Ibid.
- 18. Privileges, exclusive, under charter, strictly construed. Geo. Railroad et al. vs. Smith et al., comm'rs, et al., 694.
- Georgia Railroad charter, as to right to charge certain rates construed. *Did.*

#### COSTS.

- Awarded by Supreme Court where new trial granted on terms. Imboden et al. vs. Etowah, etc., Mining Co., 86.
- Affirmance by Supreme Court on terms, costs by whom paid. Summerville, etc., Co., vs. Baker, 513.
- Payment before dismissing and commencing in another court. City of Atlanta vs. Wilson, 714.
- Certiorari, certificate of payment of all costs necessary. Octors.
   Osborn, 716.

- 5. "Court costs," certificate of payment of, insufficient. Ibid.
- Sheriff can only charge once for bringing prisoner to court and returning to jail. Sapp, sh'f, vs. Rozar, ord'y, 722.
- COUNTY COURT. See Constitutional Law, 12, 13.
- COUNTY MATTERS. See Roads and Bridges; Bonds, 1-6; Constitutional Law, 24, 25.
- COURTS. See under special name of court. See also Constitutional Law, 8, 9, 26-28.
- CRAWFORD, M. J. (Memorial), 855.

#### CRIMINAL LAW.

- City paying prosecuting attorneys, not disqualify all jurors residing therein. Doyal vs. State, 134.
- Nolle prosequi, provisions as to, before submission of case to jury, are directory. Ibid.
  - 3. Former jeopardy, after case submitted to jury. Ibid.
  - 4. Former indictment, no such plea as pendency of. Ibid.
  - Motions of third person as if warning to flee and slayer running, admissible. Ibid.
- 6. Character of deceased for violence not proved by specific acts.
  - 7. Violent character of deceased not proved unless slayer shows prima facis that slayer had been assailed and was seeking to defend himself. Ibid.
    - 8. Murder and manslaughter, malice is distinction between. Ibid.
    - 9. Self-defence, what must appear to justify killing. *Ibid*.
- 10. Shooting at one running, and killing a by-stander, is murder, not involuntary manslaughter. Durham vs. State, 264.
  - Fine for misdemeanor, note given to solicitor general not illegal. Blain et al. vs. Hitch, 275.
  - Murder, to reduce from, to manslaughter, actual assault or attempt to commit serious injury necessary. Wortham vs. State, 336.
  - Provocation by words, threats, menaces or gestures not reduce murder. Ibid.
  - 14. Murder presumed when killing shown. Ibid.
  - 15. Justifiable homicide, what must be shown. Ibid.
  - 16. Reasonable fears, doctrine of. Ibid.
  - Escape pending exception to Supreme Court, dismissal. Madden vs. State. 383.

- Gaming tools seized as evidence, under warrant to arrest keeper. *Knoelund vs. Connally*, 424.
- Gaming house, suspected on common knowledge, broken open. Ibid.
- 20. Moral certainty sufficient. Heard vs. State, 597.
- 21. Self-defence, what necessary to justify killing. Ibid.
- 22. Court gives law, jury applies. Bailey vs. State, 617.
- 23. Murder, what intention sufficiently deliberate to make. Ibid.
- 24. Malice, what constitutes. Ibid.
- Provocation by words, threats or gestures, not reduce murder. Ibid.
- 26. Warning to crowd in court house, in charge. Ibid.
- 27. Threats not constitute party assailant. Ibid.
- Alibi, not established as such, considered to raise a reasonable doubt. Landis vs. State, 651.
- Demurrer to indictment must be in writing before arraignment. Wimbish vs. State, 718.
- 30. Venue, hearsay as to county line. Ibid.
- 31. Venue must be proved like other facts. Ibid.
- Arrest of judgment, motion must specify fatal defects in indictment. Rolin vs. State, 719.
- Indictment for larceny from house, sufficient. Ibid; Goode w. State, 752.
- Assault with intent to murder, indictment for, verdict of shooting at another. Wostenholms vs. State, 720.
- 35. Verdict, form of, not attacked below, not attacked here. Ibid.
- Larceny charged, possession of other goods taken at same time shown. Wormly vs. State, 721
- Accomplice, evidence as to burglary, what supports. Ford S. State, 722.
- 38 Malicious mischief in killing cow, what indictment sufficient. Arnold vs. State, 723.
- 39. Fence around field where cow killed shown not legal. Ibid.
- 40. Killing cow alleged, shooting shown. Ibid.
- Joint indictment and trial, all evidence to show guilt of either defendant admissible; confining effect is for charge. Johnson et al. vs. State, 725.

- 42. Murder, on trial for, grades of manslaughter given in charge, if any evidence on which to base. Freeman vs State, 736
- 43. Intend natural and necessary consequences of act, every person presumed to. *1bid*.
- 44. Malice makes murder, though mutual intention to fight. Ibid.
- 45. Presumption of innocence. Ibid.
- Former acquittal, plea good, though indictment alleges different date of larceny and ownership of goods. Goode vs. State, 752.
- Motive or malice, another indictment in which deceased was prosecutor of defendant, as illustrating. Turner vs. State, 765.
- 48. Character of deceased, dangerous or not, proved by witness who had long known him. *Ibid*.
- "Other cases" standing on same plane of justification, when law inapplicable. *Ibid*.
- 50. Murder embraces lower grades of homicides. Ibid.
- Custody, defendant taken in by sheriff, on request of surety on bond, no ground for new trial. Ibid.
- Vituperation of prisoner, attention of court must be called to. *Ibid.*
- Omission to charge on reasonable doubts, new trial. Richardson vs. State, 825.
- 54. Adulterer taken in act killed, justifiable. Ibid.
- 55. Husband's right to protect wife's virtue. Ibid.

See Practice in Superior Court, 11.

## CUSTOM, See Tax, 15.

#### DAMAGES.

- Adjoining land-owner negligently removing lateral support.
   *Montgomery et al. vs. Trustees Masonic Hall*, 38.
- Mining ditch, lessee of water refusing to give up, measure of damages discussed. Imboden et al. vs. Etowah Mining Co., 86.
- 3. Betterments of lessee, allowance made for. Ibid.
- 4. Written off to named amount, court cannot require to be, in general damages for personal tort. Sav., Fla. & W. Rwy. vs. Harper et ux., 119.
- 5. Aliter, in actions on contracts or for torts to property. Ibid.
- Contributory negligence diminishing damages; negligence causing injury, or want of ordinary care in avoiding same, doctrine discussed. Central R. R. vs. Brinson, 207.

- Trespasser or person walking on railroad track injured, right to damages discussed. *Ibid*.
- 8. "Make good the damage," error to charge that railroad must, although there was contributory negligence. *Ibid*.
- 9. Exemplary damages, putting man and wife from street car.

  Oity, etc., Rwy. vs. Brauss, 268.
- 10. Feelings hurt as element of damage. Ibid.
- "Attorneys' fees," with no amount found, illegal and written off. Ibid.
- 12. \$50.00 for putting off street car, not excessive. Ibid.
- Excessiveness, verdict not set aside for, unless authorizing suspicion of bias, prejudice or gross mistake. Central R. R. S. Roach, 434; Singleton vs. S. W. R. R., 464.
- Grading streets, measure of damages to adjoining lot. Moore ve. City of Atlanta, 611.
- Damage feasant, cattle impounded at common law. King v. Ford, 628.

See Roads and Bridges, 7; Trespass, 3; Constitutional Law, 1.

## DEBTOR AND CREDITOR.

- Wife's secret equity inferior to claim of husband's creditor without notice and on faith of that property; aliter, if with notice or not on faith of property. Brown vs. West et al., 201.
- 2. Composition with creditors at specified rate, with private agreement to give some higher rate or better security, void as to all. Woodruff & Oo. vs. Saul, 271.
- Misrepresentation or suppression of material fact avoids composition. Ibid.
- Misrepresentation innocently made, if acted on, constitutes fraud at common law. Ibid.
- 5. Insolvent traders' act of 1881 gave new remedy against traders.

  Blanchard & Burrus et al. vs. Vansyckie & Co. et al., 278.
- 6. Traders having sold out, not subject to act of 1881. Ibid.
- 7. Pre-existing liens not interfered with under act of 1881. Ibid.
- Pre-existing liens, holders of voluntarily being made parties, may be attacked. *Ibid*.
- 9. Prior alienations and liens of insolvent trader attacked. Ibid.
- Voluntary assignment act of 1881 construed liberally for creditors and strictly against debtor and assignee. Crittenden Bros. et al. vs. Coleman & Co. et al., 293.
- Schedule must be specific and attached to deed at time of execution. Ibid.

- 12. Assignment by debtor, creditors named in deed are cestuis que trust; may have relief in equity for mismanagement or waste by assignee. Cohen & Co. et al., s. Morris & Co. et al., 313.
- 13. Debt undisputed and named in deed, though not in judgment, creditor may attack assignment as fraudulent as to property obtained from him by fraud with which assignees are connected. Ibid.
- Assignment, can creditor both attack and claim under: Quære.
   (See No. 19 below.)
- 15. Payment: placing claims in hands of attorney of plaintiff, with instructions to collect and pay fi. fa., collection not bind plaintiff. Price vs. White et al., 381.
- Principal known and credit given exclusively to agent, no recovery against principal. Miller vs. Watt & Walker, 385.
- 17. Principal, purchase in fact for, but unknown to seller, latter may recover on discovering fact. *Ibid*.
- Creditor's bill by some creditors, and receiver appointed, not prevent other creditor from obtaining judgment. Citizon's Bank vs. Hubbard, 441.
- Assignment, creditor cannot both attack and claim under. Wright vs. Zeigler Bros., 501. (See No. 14 above.)
- Substitution of one debtor for another not within statute of frauds. Howell vs. Field, 592; Sapp vs. Faircloth, 690.
- Homestead under §2040, title remains in debtor and subject to debts after family broken up. Gresham vs. Johnson et al., 631.
- Preference of creditor legal. McFerran, Shallcross & Co. et al. vs. Davis, rec'r, 661.
- 23. Assignment, good unless creditors benefited repudiate. Ibid.
- 24. Assignment is trust and equity has jurisdiction. Ibid.
- Substituted debtor to pay part of his creditor's note, creditor need not pay same before suing. Sapp vs. Faircloth, 691.

See Bankruptcy; Assignment; Statute of Frauds, 1-3; Limitations, 1, 2.

#### DEEDS.

- Color of title, unauthorized deed by trustee is. Montgomery et al. vs. Trustees of Masonic Hall, 38.
- Ambiguity explained by parol. Imboden vs. Etowah, etc., Mining Co., 86.
- 3. Inconsistent clauses, first prevails. Maxwell vs. Hoppie et al., 152.
- 4. Inconsistent clauses, doctrine not favored. Ibid.

- 5. Entire instrument, given effect if possible. Ibid.
- 6. Ambiguity not raised and then explained by parol. Ibid.
- Administrator's deed, with order for sale, is more than color of title. Roberts, prest., vs. Martin et al., 196.
- Description by numbers of lots, boundaries shown by parol. Ingram vs. Fisher, 745.
- Sheriff's deed not perfect insufficient description in levy. Brown vs. Moughon, 756.
- Description, every part of, given effect, if possible. Harris vs. Hull, ex'r, 831.
- Boundaries and monuments stronger than courses and distances. Ibid.
- 12. Deeds referred to in description, effect of. Ibid.
- 13. Usury paid by deed, not void; aliter, if to secure debt. Ibid.
- 14. As color of title. See Title, 19.
- DEMURRER. See Equity 18-21, 29; Practice in Superior Court, 29, 30; Res adjudicata, 3, 4; Criminal Law, 29; Practice in Superior Court, 58.

DILIGENCE. See Negligence and Diligence.

## DOWER.

 Irregularities in proceedings cured by widow's occupying land. Peters et al. vs. West, gdn., et al., 343.

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#### EASEMENTS.

- Lateral support of soil, adjoining land-owners have right to.
   Montgomery et al. vs. Trustees of Masonic Hall, 38.
- Lateral support of buildings, where title is from common grantor. Ibid.
- 3. Party wall, no right to change to damage of other party. Ibid.
- Appurtenant to lot shown by parol. Imboden vs. Etowah, etc.. Mining Co., 86.

## EJECTMENT.

- Demise in name of S., as executor, not good, title being in S. as trustee. Schley, ex'r, et al. vs. Brown, 64.
- Contingent remaindermen, no recovery by, during life of cestuis que vie. Ibid.
- Legatees suing, what makes prima facts case. Peters et al. vs. West, gdn., et al., 343.
- Lot in declaration and proof, whether the same, is for jury.
   Ibid.

- "9th district" in declaration, land shown in "old 9th" militia district, identity for jury. Ibid.
- Clearing land during life estate not set off against mesne profits, in suit by remaindermen. Ibid.
- Establishing lost muniment of title in another court pending ejectment, notice necessary. Wimberly et al. vs. Manafield et al., 783.
- Complaint for land, defendant admits possession. Sellars vs. Chency, adm'r, 790.
- 9. Common grantor, title not proved. Ibid.

See Equity, 27.

## EQUITABLE PLEADINGS. See Pleadings, 1; Homestead, 8.

## EQUITY.

- Facts charged in knowledge of defendant taken as true, if not answered, or evasively. Capital B'k of Mucon et al. vs. Rutherford, 57.
- 2. Judgments when set aside in equity. Ibid.
- 3. Admitted facts in answer need not be proved; what it denies must be; what it asserts, not evidence if discovery waived. Imboden et al. vs. Etowah, etc., Mining Co., 86.
- Wife's separate fund paid for husband's debt to creditor with notice, and invested in land, wife may subject in equity. Maddox et al. vs. Oxford, 179.
- Same: wife may claim special lien on land and general decree against creditor. *Ibid*.
- Prohibition not remedy for errors in municipal authorities abating nuisance. Mayor, etc., vs. Minor, sung. ptnr., 191.
- Specific performance of written contract for land decreed. Jackens vs. Nicolson, 198.
- Specific performance, right is mutual, though only damages sought. *Ibid*.
- Mistake in sale on one side and fraudulent advantage taken by other, equity grants relief. Shelton & Co. vs. Ellis et al., 297.
- Sale under decree, chancellor may require to be reported for confirmation and refuse same. Holmes, trustee, et al. vs. Harris et al., 309.
- 11. Purchaser with notice takes subject to confirmation. Ibid.
- Beneficiaries for whose benefit order passed cannot complain. Ibid.
- 13. Assignment for creditors, injunction and receiver granted for

- mismanagement or waste by assignee. Cohen & Co. et al. vs. Morgan & Co. et al., 313.
- Venue of bill, except to stay proceedings, is county of substantial defendant. Edwards et al. vs. Kilpatrick, adm'r, et al., 328.
- Venue not given in county of administrator by his refusal to sue. Ibid.
- Fraudulent conveyance to defeat creditors, equity will not aid grantor or his heirs to recover. Ibid.
- Enjoining trespass to realty, venue is residence of defendant.
   Powell vs. Cheshire, 357.
- Demurrer because common law remedy, filed at first term. Ibid.
- Jurisdiction, want of in court, whenever discovered, case dismissed. Ibid.
- General demurrer for want of equity considered filed, not raise question of common law remedy. Powell vs. Cheshire, 357.
- Amendment after demurrer, latter not reach forward and cover bill and amendment. Ibid.
- 22. Waste in future enjoined and damages given for past. Ibid.
- 23. Trespass, equity will enjoin when. Ibid.
- 24. Shade trees, cutting of, enjoined. Ibid.
- Fund of ward invested in firm; surviving partner with notice assigning, fund followed by bill. Carter, sung. ptnr., et al. vs. Lipsey. 417.
- 26. Special verdict, practice as to. Ibid.
- Redemption of land recovered for non-payment of purchase money, allowed when. Hightower et al. vs. Cravens et al., 475.
- 28. Exchange of land and possession given, discovery of prior parol sale of part before deeds made, not prevent consummation.

  Temples vs. Temples et al., 480.
- Withdraw demurrer before ruled, right to. Smith vs. Horney et al., 552.
- 30. Plea and answer disposed of in order. Ibid.
- Demurrer containing general ground sustained, bar to second bill. Ibid.
- Assignment for creditor is trust, and equity has jurisdiction. McForran, Shalloross & Co. et al. vs. Davis et al., 661.
- Trust estate, power to allow mortgage at chambers. Weens, trustee, vs. Coker, 746.

- Neglect, equity will not relieve against one's own. Massey vs. Cotton States L. Ins. Co., 794.
- 35. Insurance policy plainly ordinary life policy, and premiums paid for ten years, no relief on ground that insurer applied for paid-up policy. *Ibid*.
- Sale of estate to support life tenant and minor remaindermen, equity may allow. Rakestraw, ex'z, vs. Rakestraw et al., 806.

See Injunction and Receiver; Pleadings, 1.

#### ESTATES.

- Party wall, tenancy in common in. Montgomery et al. vs. Trustees of Masonic Hall, 38.
- 2. Ante-nuptial and post-nuptial deeds construed. Ibid.
- Life use in daughter, with remainder use to her surviving children, and contingent remainder over, will construed to create. Schley, ex'r, et al. vs. Brown, 64.
- 4. Contingent remainder after trust estate, what parties necessary before court, to grant order of sale. *Ibid*.
- Clearing land during life estate not set off against mesne profits, in suit by remaindermen. Peters et al. vs. West, gdn., et al., 343.
- Life use with remainder in fee, with executory devise over, will which created. Haddock et al. vs. Perham, ord'y, et al., 572.
- Tenants in common, wife and children, with trust during minority, will which created. Edwards et al. vs. Worley, 667.
- Life estate with remainder over, will which created. Raksstraw, ex'x, vs. Raksstraw et al., 806.
- 9. "Control" estate for life, not give power of sale. Ibid.

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- 2. President and corporators dealt with as such, not denied. Ibid.
- 3. Incorporation of lessor not denied by lessee. Ibid.
- 4. Title of lessor not denied by lessee. Ibid.
- 5. Admissions in judicio estop. Anderson vs. Clark, adm'r, 362.
- Bankruptcy, plea put in and withdrawn and judgment confessed, estops from pleading same in suit on judgment. Ibid.
- 7. Sureties on bond of county treasurer receiving commission and

- collecting revenue, estopped from setting up agreement with ordinary for other sureties to sign. Lewis vs. Board of Comm'rs, etc., 486.
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- 3. Easement appurtenant to land shown by parol Ibid.
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- 5 Admissions of president of corporation in business of office, admissible. *Ibid*.
- 6 Hearsay as to death, admissible Ibid.
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- Assignee, suit against amended to be against individual, not render evidence taken inadmissible. Ibid.
- Judgment against trustee, prima facie evidence against sureties on bond. Haddock et al. vs. Perham, ord'y, et al., 572.
- Homestead by married woman not showing out of whose property carved, rejected. Langford vs. Driver, 588.
- Ground of objection to evidence must be stated. Langford vs. Driver, 588; Wormly vs. State, 721. (See Practice in Supreme Court. 6.)
- Interrogatories, motion to suppress must be in writing and adversary notified. Ibid.
- 24. County lines, hearsay as to. Wimbish vs. State, 718.
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- Conveyance to defeat creditors, equity will not aid recovery by grantor or heirs. Edwards et al. vs. Kilpatrick, adm'r, et al., 328.
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- 9. Fraud against others not known to vendor, immaterial. Ibid.
- Assignee for creditors not affected with notice of assignor's fraud. Did.
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- 4. Wages, exemption how and by whom set up. *Ibid*. See *Homestead*, 8.

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- 3. Supplement homestead granted under constitution of 1868, after adoption of that of 1877, cannot. Did.

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- 6. Dependent females, homestead under §2040 continues for. Ibid.
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- 6. Separate estate of wife sold to pay debt of husband, void. Ibid.
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- Same: special lien of wife only on land, general decree for balance against creditor. Ibid.
- Wife's money used to pay for land and title taken in husband's name, creditor of husband without notice and on faith of that property can subject. Brown vs. West et al., 201.

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- 3. Perjury as ground of illegality, witness must be convicted and evidence material. *Ibid*.
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- Possession, evidence conflicting as to, discretion of chancellor. Ibid.
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- Justice court summons in 1876, for more than \$50.00, returnable in less than 20 days, judgment void. Sellars vs. Chency, adm'r, 790.

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- Bailiff sleeping with jury, but no conversation as to case, no new trial. Ibid.
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- 7. Disqualification must be shown unknown before trial. Ibid.
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- 10. "Professional" jurors, evil discussed. Ibid.
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- 12. Regular term, jurors from may be ordered to attend special term or new jury drawn. Turner ve State, 765.
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- 10. Constable who is town marshal, levy by not bad. Ibid.
- 11. Description in levy, what insufficient. Brown vs. Moughon, 756.
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- 4. Damages, proper measure of discussed, where lessee refuses to return ditch. *Ibid.*

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   Moreland vs. Troup County, 714.

See Streets and Sidewalks.

ROCKMART. See Roads and Bridges, 6.

RULES OF COURT. See Attorney and Client, 9.

## SALES.

 Mistake on one side and fraudulent advantage taken by other, relief in equity. Shelton & Co. vs. Ellis et al., 297.

- Under decree, chancellor may order reported for confirmation, and may refuse same. Holmes, trustee, et al vs. Harris et al., 309.
- 3. Purchaser with notice takes subject to confirmation. Ibid.
- Fraud, to avoid sale, must be before and relied on. Wright a. Zeigler Bros., 501.
- 5. Fraud of vendee against others than vendor immaterial. Ibid.
- Declarations of purchaser after assigning goods, not annul sale. Ibid.
- 7. Election to affirm and enforce sale or rescind for fraud. Ibid
- 8. Delivery of personalty to consummate sale, what sufficient.

  Merritt vs. Bagwell, 578.
- Consummated, and note traded before due in part payment, maker cannot compel indorsee to rescind, though note procured by fraud. Ibid.
- Implied warranty, suitableness of goods. Barry & Co. vs. Usry et al., 711.
- Power to order sale of trust estate includes power to allow mortgage. Weems, trustee, vs. Coker, 746.
- Estate sold to support life tenant and minor remaindermen, court of equity may order. Rakestraw, ex'x. vs. Rakestraw et al., 806.
- 13. Public policy as to. Ibid.

## SAVANNAH. See Municipal Corporations, 14.

## SCIRE FACIAS.

 Former sci. fa., pendency of, not pleaded in abatement. Heath et al., adm'rs, vs. Bates, 633.

#### SERVICE.

- On non-resident railroad by posting notice beside track and mailing to president. Nashville & C. R. R. vs. McMahon, 585.
- Acknowledged before filing sufficient to proceed to judgment. Langford vs. Driver, 588.

See Practice in Supreme Court, 7-11, 39-40, 42.

## SET-OFF.

Plea of, no notice to plaintiff required. Lewis vs. Wall, 646.
 See Husband and Wife, 8-9; Estates, 5.

### SHERIFF.

 Charge for bringing prisoner to court and returning to jail, sheriff can only once. Sapp, sh'ff, vs. Rosar, ord'y, 723. SOLICITOR GENERAL. See Promissory Notes, 1.

SPECIFIC PERFORMANCE. See Equity, 7, 8.

## STATUTE OF FRAUDS.

- Money furnished T. on credit of W., is original debt of W., and not within statute. Davis. rec'r, vs. Tift, 52.
- Consideration of written promise to pay debt of another inquired into. Ibid.
- Consideration, if none, promise to pay pre-existing debt of another is nudum pactum. Ibid.
- 4. Aliter, if promise was inducement to loan. Ibid.
- Auctioneer's memorandum of sale of land, binds parties. Jackens vs. Nicolson, 198.
- Assignment of open account must be in writing. Daniel & Co. w. Tarver et al., 203.
- Substitution of one debtor for another not within statute. Howell vs. Field, 592; Sapp vs. Faircloth, 690.

STATUTE OF LIMITATIONS. See Limitations, Statute of.

STREET CAR. See Damages, 9, 12.

## STREETS AND SIDEWALKS.

- Embankment in street unprotected, runaway horse going over. City of Atlanta vs. Wilson, 714.
- Assessment for paving, etc., on adjoining owners, legal. Hayden et al. vs. City of Atlanta et al., 817.

See Municipal Corporations, 3, 4-9, 10.

## SUBPŒNA. See Witness, 2.

## TAX.

- South-western Railroad and branches subject to what rate. State vs. S. W. Railroad, 11.
- 2. Assessment on same, how made. Ibid.
- 3. Agreement of attorneys as to valuation. Ibid.
- 4. Compromise fl. fa., attorney general cannot. Ibid.
- 5. Compromise or release tax, governor cannot. Ibid.

- 6. Reassessment when necessary, and how made. Ibid.
- 7. Assessment by jury when case before them. Ibid.
- 8. Assessments where property undervalued. Ibid.
- Assessment of corporate property under acts of 1877 and 1878.
   Ibid.
- 10. Railroad and branches, value how determined. Ibid.
- 11. Interest, taxes do not bear, except in certain cases. Ibid.
- 12. Payment of as affecting prescription. Ruler et al. vs. Waters et al., ex'rs, 716.
- 13. Business tax, classification, power of city of Savannah as to.

  Wilder & Co. vs. Mayor, etc., of Savannah, 760.
- 14 Businesses, one person conducting several. Ibid.
- 15. Custom as affecting same. Ibid.
- 16. Partnership, power to tax, each member taxed. Ibid.
- Assessment for improving street, on owner of adjoining property, is not tax. Hayden et al. vs. City of Atlanta et al., 817.

TENNESSEE. See Limitations, Statute of, 8.

TIMBER. See Trespass, 3; Injunction and Receiver, 12.

TIME. See Certiorari, 2; New Trial, 5, 7; Jury and Jurors, 9.

#### TITLE.

- Color of, unauthorized deed from husband or trustee is. Montgomery et al. vs. Trustees of Masonic Hall, 38. (See Nos. 16, 18, 19 below.)
- 2. Adjoining owners, easement for lateral support. Ibid.
- 3. Party wall, tenancy in common in. Ibid.
- Trust for lives, with contingent remainder over, sale under order of chancellor, with consent of holders of vested estates, good. Schley, ex'r, st al. vs. Brown, 64.
- Bona fids purchaser protected, though judgment defective or incorrect, or sale doubtful or irregular. Ibid.
- Administrator's deed and order for sale show title; letters need not be produced. Roberts, prst., vs. Martin et al., 196.
- Parol gift of land to son not completed, judgment against donor attaches. Hughes et al. vs. Berrien, adm'r, et al., 273.
- Donee not a bond fide purchaser for value so as to invoke four years' statute. Ibid.
- 9. Colored persons, though free, could not buy or own or acquire

- a beneficial interest in realty in Augusta in 1858 and 1859 Planters L. & Sav. Bk. vs. Johnson et al., 302.
- Same: paying part of purchase money, taking receipt showing fact, and dying passed nothing to his heirs. *Ibid*.
- 11. If aliter, surviving wife taking deed in her own name, holding for twelve years and selling to bona fide purchaser without notice, title good as against heirs. Ibid.
- Exchange of land and possession gives perfect equity. Temples vs. Temples et al., 480.
- Same: is superior to prior parol sale and payment, unknown.
   Ibid.
- 14. Homestead under Code, §2040, title remains in debtor, incumbered with use. Gresham vs. Johnson et al., 631.
- 15. Summary proceeding to restore possession of receiver, title not determined on. Wikle, rec'r, vs. Silva et al., 717.
- Color of title, deed to trustees or cestuis que trust, is. Trustees
  of Chester Church vs. Blount, ex'r, et al., 779. (See Nos. 18 and
  19 below.)
- Common grantor, title in not proved in ejectment. Sellars vs. Choney, adm'r, 790.
- 18. Color of title, setting apart of year's support to part of family, is. Norris et al. vs. Dunn et al., 796.
- Color of title, what sufficient to constitute. Veal et al. vs. Robinson, 809. (Colored person in 1858. Planters' L. & Sav. B'k vs. Johnson et al., 302.) (See Nos. 1, 16, 18 above.)

See Interest and Usury, 2; Sales; Levy and Sale, 11-13.

## TORTS.

- Contracts and torts, actions on, compared and discussed. City etc., Rwy. vs. Brauss, 368.
- Contract imposing duty, breach may be tort. Ibid.
   See Damages.

## TRESPASS.

- Diligence required of railroad towards trespasser. Central R. R. vs. Brinson, 207.
- Enjoined when. Powell vs. Cheshire, 357; Strickland et al. vs. Griffin et al., 541.

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 "Mill timber," suit for damages to, damage to trees ficient. Graham vs. Sellers, 720.

See Venue, 3.

## TRUSTS AND TRUSTEES.

- Color of title, unauthorized deed from trustee is. Mon et al. vs. Trustees of Masonic Hall, 38.
- Sale of trust for lives with contingent remainder, und
  of chancellor and consent of holders of vested interest
  Schley ex'r, et al. vs. Brown, 64.
- 3. Contingent remaindermen not necessary parties. Ibid.
- Charge on life estate in nature of trust, deed which ( Maxwell vs. Hoppie et al., 152.
- Power to change trustee with approval of chancellor ne this construction. Ibid.
- Assignment for creditors, latter are cestuis que trust, an relief in equity for waste or mismanagement. Cohen et al. vs. Morris & Co. et al., 313.
- Subjecting trust estate at law, what necessary. Vason & vs. Gardner, trustee, 517; Beckwith, trustee, vs. McB Co., 642.
- 8. Suit against trustee, no recovery against him individually
- 9. Bond, breach of, jurisdiction over in court of law. Hade al. vs. vs. Perham, ord'y, for use, et al., 572.
- Trust for life with remainder over, duty of trustee to deli remaindermen. *Ibid*.
- 11. Same: bond covers duty of delivery to remaindermen. I
- 12. Decree against trustee not bar suit on bond. Ibid.
- 13. Decree against trustee prima facie evidence against sui lbid.
- Discharge sureties, delivery to trustee of property aw to him, does not. Ibid.
- Subjecting trust estate at law, not suit as to title to r Beckwith, trustee, vs. McBride & Co., 642.
- Church lot not subjected for gas fixtures bought by vestry out trustee. Ibid.
- 17. Church trustee, can he charge lot for gas fixtures? Quære.
- Tenancy in common. with trust during minority of chil will which created. Edwards et al. vs. Worley et al., 66
- Mortgage trust estate, power to, granted at chambers. W trustee, vs. Coker, 746.

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# VENDOR AND PURCHASER.

- Bona fide purchaser of trust property under incorrect judgment or irregular sale protected. Schley, ex'r, et al. vs. Brown, 64.
- Bona fide purchaser, protected under four years' statute, son, under parol gift, is not. Hughes et al. vs. Berrien, adm'r, et al., 273.
- 3. Bona fids purchase without notice from widow, who held title and possession for twelve years, takes against heirs of deceased husband who bought, paid part of purchase money and took receipt showing same. Planters' L. and Sav. B'k vs. Johnson et al., 302.
- Suit against vendor after sale to bona fide purchaser, not affect latter. Ibid.
- Redemption of land recovered for non-payment of purchase money allowed on payment. Hightower et al. vs. Oravens et al., 475.
- Exchange of land and taking possession gives perfect equity.
   Temples vs. Temples et al., 480.
- Prior equity without notice yields to exchange and possession, and no ground for rescission. *Ibid*.
- Promissory note obtained by fraud, traded before due, for personalty, maker cannot compel indorsee to rescind trade or hold property and litigate with purchaser. Merritt vs. Bagwell, 578.
- Possession, to relieve against judgment, must be actual. Phinizy & Clayton vs. Porter et al., 713.
- 10. Possession, what insufficient. Ibid.
- Bona fide purchase without notice and four years statute not apply where purchase is before judgment. Nichols vs. Whelchel et al., 719.

See Promissory Notes, 3-5, 10; Debtor and Creditor, 16-17; Sales.

## VENUE.

- Bill in equity, except to enjoin proceedings, venue is county of residence of substantial defendant. Edwards et al. vs. Kilpatrick, adm'r, et al., 328.
- Administrator refusing to sue, not give venue in his county. Ibid.
- Enjoining trespass on land, venue is residence of defendant. Powell vs. Cheshire, 357.
- 4. Hearsay as to county line. Wimbish vs. State, 718.

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5. Criminal case, venue proved beyond reasonable doubt. Ibid.

## VERDICT.

- General damages for personal tort not written down to specified amount and new trial refused; aliter, where there is special measure of damages. Sav., Fla. & W Rwy. vs. Harper et ux., 119.
- Amended to conform to declaration; or illegal part written off. Steed vs. Cruise et al., 168.
- Reasonable construction given to, and not avoided except from necessity. Ibid.; Carter, sung. ptnr., et al. vs. Lipsey, 417.
- "Attorneys' fees," added to verdict for damages, is without meaning and written off. City, etc., Rwy. vs Brauss, 368.
- Logical inference, verdict may rest on. Müller vs. Watt & Walker, 385.
- 6. Open account with personal service, verdict without proof-Fryer vs. Cole & Co., 687.

VOLUNTEERS. See Judgments, 3.

WAGES. See Garnishment, 4.

#### WAIVER.

- Right of appeal to courts, do members waive, by joining association where by-laws provide for reference to committee?
   Quere. Harrington vs. Workingmen's Ben. Ass'n, 340.
- 2. Rule nisi waived by presence and participation in hearing.

  Rogers vs. Cherokes, etc., Co., 717.

## WARRANTY.

1. Implied that goods sold are suitable for purpose. Barry & Co. vs. Usry et al., 711.

## WILLS.

- Life use to daughter with remainder to her surviving children for life and contingent remainder over to children of testator's grandchildren, will construed to create. Schley, ex'r, et al. vs. Brown, 64.
- Lost will, how probated. Mosely et al. vs. Carr et al., adm'rs, 333.
- 3. Evidence, will proved in common form, admissible in. Peters et al. vs. West, gdn., et al., 343.

- Conclusive, if unattacked for seven years, will proved in common form is. Ibid.
- Life use, with remainder in fee, and executory devise if remainder failed, will which created. Haddock et al. vs. Perham, ord'y, et al., 573.
- Tenancy in common, with trust for children during minority, will construed to give. Edwards et al. vs. Worley, 667.
- 7. Posthumous child revokes will. Hart vs. Hart, 764.
- 8. Posthumous child revokes administration under will. Ibid.
- Life estate with remainder over, will construed to convey. Rakestraw, ex'x, vs. Rakestraw et al., 806.
- 10. "Control" for life, not given right of sale. Ibid.

## WITNESS.

- Subprenaed under wrong name, not ground for new trial, as newly discovered evidence. Sav., Fla. & W. Rwy. vs. Harper et ux., 119.
- 2. Subpoena duces tecum to warrantor reaches deed placed by him in hands of attorney employed by him to defend warrantee. Steed vs. Cruise et al., 168.
- Mistake claimed by witness answering clearly and as he had before stated, no new trial. Maddox et al. vs. Oxford, 179.
- Leading allowed where witness unwilling or contumacious. Durham vs. State, 264.
- Leading not allowed simply because female witness excited.
   Ibid.
- Impeached, whether witness is, for jury. Ford vs. State, 722;
   Turner vs. State, 765.
- Newly discovered witness, character, etc., must be shown. Hutchins vs. State, 524.
- Absent from state, as ground for continuance. Turner vs. State, 765.
- Character for veracity proved by reputation where he formerly lived. Ibid.

## WORDS AND PHRASES.

- "Appurtenance" shown by parol what is. Imboden et al. vs. Etowah, etc., Co., 86.
- 2. "Three months" construed. W. & A. R. R. vs. Carson, 388.
- "And" instead of "or," by clerical error. Heard vs. State, 597, 601.

- "Judgment" or "verdict" on open account by default. Fryer
   Cole & Co., 687.
- 5. "Court costs" include what. Osborn vs. Osborn, 716.
- 6. "Until" includes time named. Rogers vs. Cherokee, etc., Co., 717.
- "Set up defence," of legal fence, need not be by special plea.
   Arnold vs. State, 723.
- 8. "Authorize" and "require" verdict, compared. Turner w. State, 765.
- 9. "At issue" in ejectment case, when parties are. Wimberly et al. vs. Mansfield et al., 783.
- "Writ of error," what constitutes. Masland, Jr., et ux. vs Kemp et. al., 786.
- "Control" estate for life, not include power of sale. Rakestraw, ex'x, vs. Rakestraw et al., 806.

## YEAR. See Jury and Jurors, 9.

## YEAR'S SUPPORT.

- Lapse of time before application and use of place by widow is ground for resistance. Goss vs. Greenaway et al., 130.
- 2. Judgment granting not collaterally attacked, except for want of jurisdiction apparent on face of record. *Ibid*.
- Notice of application to representative of estate necessary; if none, no notice. *Ibid*.
- 4. Sale by widow of land set apart for support of family, is good. Steed vs. Oruise et al., 168.
- 5. Order for sale, has ordinary any power to grant? Quare. Ibid.
- 6. Continuance of support, where estate kept together more than one year. Woodbridgs vs. Woodbridgs, gdn., et al., 734.
- Debts, absence of, need not be alleged; matter for objection.
- Some of children only mentioned in proceedings, effect. Norris et al. vs. Dunn et al., 796.
- 9. Color of title, setting apart is. Ibid.
- Fraud not presumed from failure to mention some of children. Ibid.



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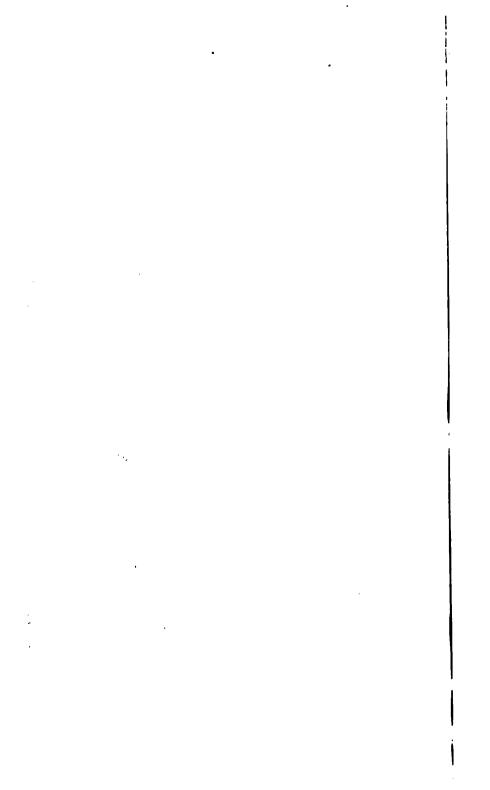
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On page 85, at beginning of eleventh line, for "George Schley's will," read "Governor Schley's will."
On page 569, head-note 3, for "mortgage on realty," read "mort-

gage on personalty."



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